

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1923.

No. 4033.

No. 9 Special Calendar

38

term 1924

No. 38, SPECIAL CALENDAR.

FRANK L. WAGNER, APPELLANT,

vs.

NICHOLAS APFELBAUM, AS ADMINISTRATOR OF THE
ESTATE OF ROSE URDONG, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED AUGUST 16, 1923.

PRINTED SEPTEMBER 26, 1923.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1923.

No. 4083.

No. 38, SPECIAL CALENDAR.

FRANK L. WAGNER, APPELLANT,

vs.

NICHOLAS APFELBAUM, AS ADMINISTRATOR OF THE
ESTATE OF ROSE URDONG, DECEASED, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 4033.

FRANK L. WAGNER, Appellant,

vs.

NICHOLAS APFELBAUM, as Admr., &c.

a Supreme Court of the District of Columbia.

At Law.

No. 67344.

NICHOLAS APFELBAUM, as Administrator of the Estate of Rose
Urdong, Deceased, Plaintiff,

vs.

HARRY M. CRANDALL, FRANK L. WAGNER, UNION IRON WORKS
Company, a Corporation; John H. Ford, District of Columbia, a
Municipal Corporation, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District
of Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had, in the above-entitled cause, to wit:

Declaration.

Filed Jan. 26, 1923.

In the Supreme Court of the District of Columbia.

At Law.

No. 67344.

NICHOLAS APFELBAUM, as Administrator of the Estate of Rose Urdong, Deceased, Plaintiff,

vs.

HARRY M. CRANDALL, FRANK L. WAGNER, UNION IRON WORKS Company, a Corporation; John H. Ford, District of Columbia, a Municipal Corporation, Defendants.

The plaintiff, Nicholas Apfelbaum, as administrator of the estate of Rose Urdong, deceased, duly appointed by the Supreme Court of the District of Columbia, holding a Probate Court, and qualified and acting as such, sues the defendants, Harry M. Crandall, Frank L. Wagner, John H. Ford, Union Iron Works Company, a corporation, and District of Columbia, a municipal corporation, for that heretofore, to wit, prior to the 28th day of January, in the year one thousand nine hundred twenty-two, a certain theatre building known as the Knickerbocker Theatre, was caused to be erected at or near the intersection of Eighteenth Street and Columbia Road, in the District of Columbia, which said theatre building was intended to be used and was thereafter, on the said 28th day of January, 1922, used as a motion picture theatre, — which the public generally, including the plaintiff's intestate, were intended to be invited, and were invited to enter for the purpose of witnessing the exhibitions to be given therein, and which the public generally, including the plaintiff's intestate, did thereafter enter for said purpose; the plans and specifications and the design and structure of said building were prepared and performed under the supervision and direction of the defendant Crandall; the defendant Wagner was the general contractor engaged for the purpose of causing said building to be erected, and he did, as such general contractor, cause said building to be erected; the iron and steel work which entered into the construction of said building was designed, fabricated and furnished and installed by the defendant Union Iron Works Company, under the supervision and direction of the defendant Ford, said work having been originally undertaken by C. A. Schneider's Sons, acting under the direction and supervision of the defendant Ford, which concern subsequently was succeeded by the defendant Union Iron Works Company, which assumed all of its rights and liabilities; and the defendant District of Columbia was a municipal corporation charged with the supervision of all building operations within the

territorial limits of the District of Columbia and charged with the duty of seeing to it that structures therein erected were properly and safely constructed; by reason of the several premises it became and was and continued to be, during the planning, designing and construction of said building, the duty of the defendant Crandall to have the plans and specifications, designing and construction of said building prepared and performed in such manner as that said building when erected should be safe for such persons as might thereafter be therein; it became and was and continued to be the duty of the defendant Wagner to have said building constructed in such a careful and skillful manner as that said building, when erected, should be safe for such persons as might thereafter be therein; it became and was and continued to be the duty of the defendants Ford and Union Iron Works Company so to design, fabricate, furnish and install the iron

3 and steel work in said building as that said building when constructed should be safe for such persons as might thereafter be therein; and it became and was and continued to be the duty of the defendant District of Columbia so to supervise the planning, designing and construction of said building as that the same, when completed, should be safe for such persons as might thereafter be therein; yet nevertheless, the said defendants and each of them, failed in their duties in the premises, in that the defendant Crandal negligently failed to have the plans and specifications, design and construction of said building prepared and performed in such manner as that the same was safe for such persons as might be in said building when completed; the defendant Wagner negligently failed to have said building constructed in such a careful and skillful manner as that said building was safe for such persons as might be in said building when completed; the defendants Ford and Union Iron Works Company negligently failed in their duty so to design, fabricate, furnish and install the iron and steel work in said building as that said building was safe for such persons as might be in said building when completed; and the defendant District of Columbia negligently failed so to supervise the designing, planning and construction of said building as that said building was safe for such persons as might be in said building when completed; said building was completed prior to the said 28th day of January, 1922, but as a result of the negligence of the defendants the same was, when erected, unsafe and in a dangerous and defective condition, and continued so to be, and on the day aforesaid, the plaintiff's intestate, one Rose Urdong, then a citizen of the United States and a resident of the District of Columbia, was in said theatre building for the purpose of witnessing a motion picture exhibition therein, as law-

4 fully she might be, and while the plaintiff's intestate was in the exercise of due care, the roof, ceiling and balcony of said building fell, as a result of the negligence of the defendants, and the plaintiff's intestate was struck by portions of the falling fragments thereof, as a consequence of which the plaintiff's intestate was mortally injured and caused to die on the day aforesaid; and the plaintiff's intestate left surviving her her mother, one Dina Apfelbaum, as her next of kin, to whom pecuniary damage has been

caused as a consequence thereof, in the sum of ten thousand dollars (\$10,000).

Wherefore, the plaintiff, as administrator as aforesaid, and pursuant to the statute in such case made and provided, brings this suit, for the benefit of said next of kin, and claims of the said defendants, and each of them, the sum of ten thousand dollars (\$10,000), besides costs.

2. The plaintiff, as administrator as aforesaid, further sues the said defendants for that heretofore, to wit, prior to the 28th day of January, in the year one thousand nine hundred twenty-two, a certain theatre building known as the Knickerbocker Theatre, was caused to be erected at or near the intersection of Eighteenth Street and Columbia Road, in the District of Columbia, which said theatre building was intended to be used and was thereafter on the said 28th day of January, 1922, used as a motion picture theatre, which the public generally, including the plaintiff's intestate, were intended to be invited, and were invited to enter for the purpose of witnessing the exhibitions to be given therein, and which the public generally, including the plaintiff's intestate, did thereafter enter for said purpose; the plans and specifications and the design and

5 structure of said building were prepared and performed under the supervision and direction of the defendant Crandall; the defendant Wagner was the general contractor engaged for the purpose of causing said building to be erected, and he did, as such general contractor, cause said building to be erected; the iron and steel work which entered into the construction of said building was designed, fabricated and furnished and installed by the defendant Union Iron Works Company, under the supervision and direction of the defendant Ford, said work having been originally undertaken by C. A. Schneider's Sons, acting under the direction and supervision of the defendant Ford, which concern subsequently was succeeded by the defendant Union Iron Works Company, which assumed all of its rights and liabilities; and the defendant District of Columbia was a municipal corporation charged with the supervision of all building operations within the territorial limits of the District of Columbia and charged with the duty of seeing to it that structures therein erected were properly and safely constructed; by reason of the several premises it became and was and continued to be, during the planning, designing and construction of said building, the duty of the defendant Crandall to have the plans and specifications, designing and construction of said building prepared and performed in such manner as that said building when erected should be safe for such persons as might thereafter be therein; it became and was and continued to be the duty of the defendant Wagner to have said building constructed in such a careful and skillful manner as that said building, when erected, should be safe for such persons as might thereafter be therein; it became and was

6 and continued to be the duty of the defendants Ford and the Union Iron Works Company so to design, fabricate, furnish and install the iron and steel work in said building as that said building when constructed should be safe for such persons

as might thereafter be therein; and it became and was and continued to be the duty of the defendant District of Columbia so to supervise the planning, designing and construction of said building as that the same, when completed, should be safe for such persons as might thereafter be therein; yet nevertheless, the said defendants and each of them, failed in their duties in the premises, in that the defendant Crandall negligently failed to have the plans and specifications, design and construction of said building prepared and performed in such manner as that the same was safe for such persons as might be in said building when completed; the defendant Wagner negligently failed to have said building constructed in such a careful and skillful manner as that said building was safe for such persons as might be in said building when completed; the defendants Ford and Union Iron Works Company negligently failed in their duty so to design, fabricate, furnish and install the iron and steel work in said building as that said building was safe for such persons as might be in said building when completed; and the defendant District of Columbia negligently failed so to supervise the designing, planning and construction of said building as that said building was safe for such persons as might be in said building when completed; said building was completed prior to the said 28th day of January, 1922, and on said day was operated for profit by the defendant Crandall jointly with the Knickerbocker Theatre Company, of Washington, District of Columbia, a corporation, but as

7 a result of the negligence of the defendants the same was, when erected, unsafe and in a dangerous and defective condition, and continued so to be, and on the day aforesaid, the plaintiff's intestate, one Rose Urdong, then a citizen of the United States and a resident of the District of Columbia, was in said theatre building for the purpose of witnessing a motion-picture exhibition therein, as lawfully she might be, and while the plaintiff's intestate was in the exercise of due care, the roof, ceiling and balcony of said building fell; as a result of the negligence of the defendants, and the plaintiff's intestate was struck by portions of the falling fragments thereof, as a consequence of which the plaintiff's intestate was mortally injured and caused to die on the day aforesaid; and the plaintiff's intestate left surviving her her mother, one Dina Apfelbaum, as her next of kin, to whom pecuniary damage has been caused as a consequence thereof, in the sum of ten thousand dollars (\$10,000).

Wherefore, the plaintiff, as administrator as aforesaid, and pursuant to the statute in such case made and provided, brings this suit, for the benefit of said next of kin, and claims of the said defendants, and each of them, the sum of ten thousand dollars (\$10,000), besides costs.

LAWRENCE KOENIGSBERGER,

Attorney for Plaintiff.

Motion to Strike Out.

Filed Feb. 21, 1923.

In the Supreme Court of the District of Columbia.

At Law.

No. 67344.

NICHOLAS APFELBAUM, as Administrator of the Estate of Rose
Urdong, Deceased, Plaintiff,

v.

HARRY M. CRANDALL et al., Defendants.

Now comes the defendant Frank L. Wagner and moves the Court to strike out the declaration in the above entitled cause filed and each count thereof, separately and severally, for the reasons following:

1. Misjoinder of counts.
2. Misjoinder of causes of action presented by different counts.
3. Misjoinder of causes of action in each count.
4. Misjoinder of parties defendant in different counts.
5. Misjoinder of parties defendant in each count.
6. For duplicity.

W. C. SULLIVAN,
Attorney for Defendant Frank L. Wagner.

Lawrence Koenigsberger, Esq.,
Attorney for Plaintiff.

SIR:

Please take notice that the foregoing and annexed motion will be called to the attention of the Court for its action, on Friday next, the 23d day of February, A. D. 1923, at 10:00 o'clock,
9 A. M., or so soon thereafter as counsel may be heard.

W. C. SULLIVAN,
Attorney for Defendant Frank L. Wagner.

Supreme Court of the District of Columbia.

Tuesday, April 10th, 1923.

Session resumed pursuant to adjournment Hon. A. A. Hoehling,
Justice presiding.

* * * * *

At Law.

No. 67344.

NICHOLAS APFELBAUM, Adm'r,

vs.

HARRY M. CRANDALL et al.

Upon motion of the defendant Frank L. Wagner, made by his attorney in open court, leave is granted said defendant to file a demurrer in each cause to the declaration without prejudice to the motion filed to strike out said declaration.

Demurrer of Frank L. Wagner.

Filed Apr. 10, 1923.

In the Supreme Court of the District of Columbia.

At Law.

No. 67344.

NICHOLAS APFELBAUM, as Administrator of the Estate of Rose Urdong, Deceased,

v.

HARRY M. CRANDALL et al

The defendant Frank L. Wagner says that the plaintiff's declaration and each count thereof is bad in substance.

W. C. SULLIVAN,

Attorney for Defendant Frank L. Wagner.

10 NOTE.—Among the matters of law intended to be argued on the hearing of the foregoing demurrer are the following:

1. That there is a misjoinder of causes of action in each count.

2. That there is a misjoinder of causes of action presented by different counts.

3. That there is a misjoinder of parties defendant in each count.

4. That there is a misjoinder of parties defendant in different counts.

5. That there is a misjoinder of counts.

6. That the declaration and each count thereof fails to state facts constituting a cause of action against this defendant.

7. That the declaration and each count thereof fails to state facts showing negligence on the part of this defendant.

8. That the declaration and each count thereof fails to state facts constituting negligence.

9. That the declaration and each count thereof fails to show any liability of this defendant for any negligence complained of therein.

10. That the declaration and each count thereof fails to show that this defendant had any charge or control whatever over the building at the time when the roof, ceiling and balcony fell as complained of therein.

11. That the declaration and each count thereof shows that this defendant was not in control or charge of the building at the time when the roof, ceiling and balcony fell as complained of therein.

12. That the declaration and each count thereof fails to show a state of facts which will permit of the application of the doctrine *res ipsa loquitur* to the case as to this defendant.

11 13. That the declaration and each count thereof shows a state of facts rendering the doctrine *res ipsa loquitur* inapplicable to the case as to this defendant.

W. C. SULLIVAN,
Attorney for Defendant Frank L. Wagner.

Lawrence Koenigsberger, Esq.,
Attorney for Plaintiff.

SIR:

Please take notice that the foregoing and annexed demurrer will be called to the attention of the Court, for its action, on Friday next, the 13th day of April, A. D. 1923, at ten o'clock, A. M., or so soon thereafter as counsel may be heard.

W. C. SULLIVAN,
Attorney for Defendant Frank L. Wagner.

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Filed May 23, 1923.

In the Supreme Court of the District of Columbia

Law. No. 67327.

GUY STURGIS, Administrator, etc., Plaintiff,

v.

KNICKERBOCKER THEATRE Co. et al.

Memorandum.

The declaration in this case was filed by the plaintiff, as administrator of the estate of Victor M. Sturgis, deceased, against the Knickerbocker Theatre Company, a corporation, Harry M. Crandall, Reginald W. Geare, John H. Ford, Union Iron Works Company, and the District of Columbia; it being alleged that plaintiff's intestate met his death by reason of the collapse of the roof, ceiling and balcony of the theatre named.

The declaration details the alleged connection of each of the defendants named with the work of planning, supervising, inspecting, constructing and maintaining the building named; it also charges the duty in respect of each such defendant and the alleged act or acts of negligence of each; and concludes that, through the negligence and carelessness of the defendants, and each of them, and as a result thereof, the decedent, without any negligence on his part, was then and there killed.

The defendant, District of Columbia, filed the general issue plea of "not guilty," and the other defendants named, with the exception of the defendant, Knickerbocker Theatre Company, filed motion to strike out or dismiss the declaration; the defendant, Harry M. Crandal, as *amicus curiæ*, having filed what is called a "suggestion" made to the court that the defendant, Knickerbocker Theatre
13 Company, had been dissolved, by a certificate filed with the Secretary of State of Delaware on July 5, 1923, in accordance with the statutes of that State. Motion to strike out said "suggestion" was granted by the Court.

The motions to strike out or dismiss the declaration were based on the several grounds of misjoinder of alleged causes of action against separate and distinct defendants; misjoinder of parties defendant, etc.

Those motions were orally argued by counsel, and, thereafter, by written memorandum opinion filed by the Court, March 27, 1923, it was directed that order be entered overruling said motions to strike out or dismiss, with leave to plead over.

Thereafter, and on March 23, 1923, the defendant, Reginald W. Geare, filed demurrer to the declaration, alleging, as points of law to be argued in support thereof, the following:

"1. The declaration fails to set forth facts which constitute a cause of action against the defendant named.

"2. The declaration shows, upon its face, that no negligence charged against said defendant, was or could have been the proximate cause of the injury to the decedent.

"3. The declaration, upon its face, shows that the negligence alleged against said defendant was not the proximate cause of the injury or damages sued for."

The propositions of law argued both in support of and in opposition to the demurrer filed herein concern the several matters, (a) whether the doctrine of *res ipsa loquitur* is properly applicable to a situation where, at the time of the occurrence complained of, the

defendant sought to be charged was not in the possession,
14 management or control of the particular instrumentality which inflicted the injury; (b), whether the doctrine just mentioned is applicable where *specific* (as distinguished from *general*), negligence is alleged against the defendant; the demurrant, Geare, contending that *specific* negligence is so charged against him; (c), whether a general allegation of negligence is sufficient as against a general demurrer; and, (d), whether one who negligently and defectively constructs a building which, thereafter, because of such faulty construction, collapses and injures a third person, is exempt

from liability, because, at the time of such accident, the building had been completed and turned over by the architect, contractor, or subcontractors, as the case may be, to its owner, who, thereafter, operated the same, and was in the exclusive operation and control thereof at the time of the accident.

So far as concerns the above several matters, (a), (b), and (c), suffice it to say, that the Court is of opinion that the declaration herein is sufficient as against a general demurrer.

The above matter (d), however presents a question that is not only one of controlling ultimate importance herein, as the Court views it; but, also, one that is involved in conflict of judicial decisions, both for and against, almost bewildering in number; thus making it difficult to select any one group of decided cases as absolutely or necessarily determinative of the instant case, as developed by the situation of fact alleged in the declaration.

Counsel have argued the case with exceeding care and
15 ability, and have filed typewritten briefs indicating exhaustive and painstaking study and search of the authorities; all of which have been of great help to the Court in its consideration of the important questions presented.

In view of the sharp conflict of decision, both State and Federal, it will be helpful, quite naturally, if it be found that the Court of Appeals of this District heretofore has answered the perplexing question. There is a decision by that Court, which seems helpful in disposing of the question last above suggested, and that is the case of *Washington Ry. & Elec. Co. v. Washington Terminal Co.*, (44 App. D. C. 470, 485).

There, the Washington Ry. & Elec. Co. sought to recover for damage to its tracks, conduits, viaducts, foundations, and supports therefor and used in connection therewith, along First Street, East, between East Capitol Street and B Street, North, resulting from the sinking of the surface of the street; and which condition was claimed to have been occasioned by the *construction* of a steam railroad tunnel under the West side of the street named; or, in other words, by the erection and continuance of a nuisance. It seems that the Philadelphia, Baltimore & Washington R. R. Co., hereinafter called the Philadelphia Company, (under the authority of an act of Congress in that behalf), undertook the construction of the railroad tunnel, at the place named, and did so construct it, acting therein by and through the New York Continental Jewell Filtration Co. It was claimed in the case that the tunnel was *negligently* constructed. The Philadelphia company, with other companies, was sued by the street railway company for damages concerning the matter, and, among other defenses interposed by it, was that, upon the
16 completion of the tunnel, it was turned over to the Washington Terminal Company; which latter company, thereafter, *operated* it; the Philadelphia company, from thence forward, and in common with other railroad companies, merely having the use thereof under a stipulated rental. Verdict and judgment were against the Philadelphia company.

In disposing of said asserted ground of non-liability, the Court of Appeals, in its opinion, thus stated:

"The further contention is made by this appellant that it ought not to respond in damages, because the evidence shows that, immediately after the completion of the tunnel, it was turned over to the terminal company, which company has since operated it. So thoroughly is the rule established that he who erects a nuisance continues liable as long as the nuisance continues, that it is unnecessary to dwell upon this contention. *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333; *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201, 38 Atl. 631. In the last case cited, the court said: 'The ground upon which the alienor is held liable for a nuisance created by him is, that he is the author of the original wrong, and transferring the premises with the original wrong, still existing is treated as affirming the continuance of it.'"

If a defectively and negligently constructed tunnel may properly be regarded as a nuisance; it would not seem unreasonable to apply the same doctrine to a defectively and negligently constructed theater building; so, too, if one who defectively and negligently constructs a tunnel, which brings about a condition of depression of
17 street railway tracks on the surface overhead, is liable for damage which results *after* the completion of the tunnel, and while it is being operated by its owner; what sound reason is there for denying like responsibility and liability when a defectively constructed theater collapses and kills and injures scores of persons then present in the building as patrons?

It has been remarked both by text writers and in judicial decisions that it is not always easy to make an exact distinction between negligence and nuisance, and this for the reason that the same act not infrequently constitutes both negligence and a nuisance.

Be that as it may, and whether the present action, viewed, as of course it must be, in the light of the averments contained in the declaration; and whether the action be deemed to be one in negligence merely, not involving the element of nuisance, or whether it properly may be regarded as one in negligence embracing as well the element of nuisance; the Court is of opinion that the demurrer herein should be *overruled*.

As above noted, the Court, on March 27, 1923, filed memorandum opinion, overruling defendant's motion to dismiss filed herein. At the request of counsel for defendant, counsel for plaintiff consenting, the formal entry of that order was temporarily suspended, in order to permit the filing of demurrer by defendant; thus, in the event that the demurrer be overruled, appropriate application to the Court of Appeals might be made timely for the allowance of a special appeal both as to the order overruling the motion to dismiss and the demurrer.

Accordingly, order may now be entered herein overruling the motion to dismiss and, likewise, overruling the demurrer.

18 In order that opportunity may be afforded to defendants to apply to the Court of Appeals for the allowance of a special

appeal, if so advised, let the usual order requiring defendants to plead over be suspended for a period of twenty (20) days from this date.

A. A. HOEHLING,

Justice.

May 22, 1923.

Supreme Court of the District of Columbia.

Wednesday, May 23rd, 1923.

Session resumed pursuant to adjournment, Hon. A. A. Hoehling, Justice presiding.

* * * * *

At Law.

No. 67344.

NICHOLAS APFELBAUM, Admr., Plff.,

vs.

HARRY M. CRANDALL et al., Defts.

The foregoing entitled causes coming on for hearing on the several motions filed on behalf of the defendants, Crandall, Wagner, Ford and the Union Iron Works, by their respective attorneys of record, to dismiss or strike out the declaration and said motions having been in each cause considered, the same are hereby severally overruled. Further upon consideration of the demurrer filed in each of said causes by the defendant Wagner, to the declaration, it is ordered that said demurrer be, and is hereby in each cause overruled.

Upon request an exception is hereby noted on behalf of the aforesaid defendants to the action of the Court, in overruling said motions and the demurrers.

In order that the opportunity may be afforded said defendants to apply to the Court of Appeals, for the allowance of a special appeal, if so advised, the entry of the usual order to plead over is hereby suspended for twenty days from this date.

20 *Order Granting Petition for Allowance of Special Appeal.*

Filed Jul. 27, 1923.

Court of Appeals of the District of Columbia, October Term, 1923.

No. 856, Original.

Law. No. 67344.

FRANK L. WAGNER, Petitioner,

vs.

NICHOLAS APFELBAUM, as Administrator of the Estate of Rose Urdong, Deceased.

On consideration of the petition for the allowance of a special appeal in the above entitled cause from the order of the Supreme Court of the District of Columbia entered therein on May 23, 1923;

It is by the Court this day ordered that said petition be, and the same is hereby, granted.

CHAS. H. ROBB,
JOSIAH A. VAN ORSDEL,
Associate Justices.

July 25, 1923.

A true copy:

Test:

[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals
of the District of Columbia.*

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Assignment of Errors.

Filed Jul. 27, 1923.

In the Supreme Court of the District of Columbia.

At Law.

No. 67344.

NICHOLAS APFELBAUM, as Administrator of the Estate of Rose Urdong, Deceased,

v.

HARRY M. CRANDALL et al.

The defendant Frank L. Wagner assigns as errors committed by the Trial Court, for consideration by the Court of Appeals on the

special appeal allowed to him in the above entitled cause, that the Court erred in the several particulars and respects following, namely:

1. In not holding that the declaration presents a misjoinder of counts.

2. In not holding that the declaration presents a misjoinder of causes of action in different counts.

3. In not holding that the declaration presents a misjoinder of causes of action in each count.

4. In not holding that the declaration presents a misjoinder of parties defendant in different counts.

5. In not holding that the declaration presents a misjoinder of parties defendant in each count.

6. In not holding that the declaration and each count thereof is duplicitous.

7. In not holding that the declaration and each count thereof fails to state facts constituting a cause of action against this defendant.

8. In not holding that the declaration and each count thereof fails to state facts showing negligence on the part of this defendant.

9. In not holding that the declaration and each count thereof fails to state facts constituting negligence.

10. In not holding that the declaration and each count thereof fails to show any liability of this defendant for any negligence complained of therein.

11. In not holding that the declaration and each count thereof fails to show that this defendant had any charge or control whatever over the building at the time when the roof, ceiling and balcony fell as complained of in the declaration and each count thereof.

12. In not holding that the declaration and each count thereof shows that this defendant was not in control or charge of the building at the time when the roof, ceiling and balcony fell as complained of therein.

13. In not holding that the declaration and each count thereof fails to show a state of facts which will permit of the application of the doctrine *res ipsa loquitur* to the case as to this defendant.

14. In not holding that the declaration and each count thereof shows a state of facts rendering the doctrine *res ipsa loquitur* inapplicable to the case as to this defendant.

15. In holding that the declaration states a cause of action by way of nuisance.

16. In holding the doctrine *res ipsa loquitur* applicable to the facts of this case as pleaded.

17. In holding that the declaration or either count thereof states a cause of action against this defendant notwithstanding the failure therein to charge that this defendant had any charge or control whatever over the building at the time when the roof, ceiling and balcony fell as complained of in the declaration and each count thereof.

18. In overruling this defendant's motion to strike out the declaration and each count thereof.

19. In overruling this defendant's demurrer to the declaration and each count thereof.

W. C. SULLIVAN,
Attorney for Defendant Frank L. Wagner.

Designation of Record.

Filed Jul. 27, 1923.

In the Supreme Court of the District of Columbia.

At Law.

No. 67344.

NICHOLAS APFELBAUM, as Administrator of the Estate of Rose Urdong, Deceased,

v.

HARRY M. CRANDALL et al.

Now comes the defendant Frank L. Wagner, appellant in special appeal, and designates to constitute the record on the said special appeal in the above entitled cause granted the following, namely:

1. The declaration, filed January 23, 1923.
2. The motion to strike out the declaration, filed February 21, 1923.
3. The leave granted to file demurrer without prejudice, by order entered April 11, 1923.
- 24 4. The demurrer filed April 11, 1923.
5. The order overruling the motion to strike out and the demurrer, entered May 23, 1923.
6. The opinion of the Court filed May 23, 1923.
7. The assignment of errors.
8. This designation.

W. C. SULLIVAN,
Attorney for Defendant Frank L. Wagner,
Appellant on Special Appeal.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 67344 at Law, wherein Nicholas Apfelbaum as Administrator of the Estate of Rose Urdong, Deceased,

is Plaintiff and Harry M. Crandall et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 16th day of August, 1923.

[Seal of Supreme Court of the District of Columbia.]

MORGAN H. BEACH

Clerk,

By W. E. WILLIAMS,

Assistant Clerk.

EW.

Endorsed on cover: District of Columbia Supreme Court. No. 4033. Frank L. Wagner, appellant, vs. Nicholas Apfelbaum, as admr., &c. Court of Appeals, District of Columbia. Filed Aug. 16, 1923. Henry W. Hodges, clerk.

Return to Writ of Certiorari

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1923.

No. 4033.

No. 8 Special Calendar
January Term 1924

No. 38, Special Calendar.

FRANK L. WAGNER, APPELLANT,

v8.

**NICHOLAS APFELBAUM, AS ADMINISTRATOR OF THE
ESTATE OF ROSE URDONG, DECEASED.**

FILED NOVEMBER 26, 1923.

PRINTED DECEMBER 18, 1923.

Court of Appeals of the District of Columbia.

No. 4033.

No. 38, Special Calendar.

FRANK L. WAGNER, Appellant,

vs.

NICHOLAS APFELBAUM, as Administrator of the Estate of ROSE
URDONG, Deceased.

Memorandum Opinion.

Filed March 27, 1923.

In the Supreme Court of the District of Columbia.

Law. No. 67327.

GUY STURGIS, Administrator, etc.,

v.

KNICKERBOCKER THEATRE COMPANY et al.

The declaration in this case was filed January 26, 1923, by the plaintiff, as administrator of the estate of Victor M. Sturgis, deceased, against the Knickerbocker Theatre Company, a corporation, Harry M. Crandall, Reginald W. Geare, John H. Ford, Union Iron Works Company, and the District of Columbia, and grows out of the tragedy at the Knickerbocker Theatre on January 28, 1922, where plaintiff's intestate met his death by reason of the collapse of the roof, ceiling and balcony of the Theatre named.

The declaration alleges, in substance, that the Knickerbocker Theatre was equipped and provided with seats for many hundreds of persons, and was designed and intended to be used for profit as a moving picture theatre and a place of amusement and entertainment, to which the public generally were invited, and were to be charged for admission; that the theatre was constructed and caused to be constructed by the defendants, Knickerbocker Theatre Company and Harry M. Crandall, the latter being the president, general

manager, director and the controlling stockholder thereof while the theatre was in the course of construction, and, as such, and also individually, had active control and direction of the construction of the theatre; that the defendant, Geare, at the direction and under the employment of the two defendants just named, undertook and assumed to design and draw the plans and specifications for the construction of said theatre, and to exercise general direction and supervision of the construction thereof; that the defendant, Ford, acting for and on behalf of C. A. Schneider's Sons, undertook and assumed to design, fabricate, furnish and install the structural steel and iron to be used in the theatre for supporting the roof, ceiling and balcony thereof; that, during the course of construction, the defendant, Union Iron Works Company, was incorporated and succeeded to the business of said C. A. Schneider's Sons, including the matter just referred to, and that said defendant, Ford, continued the active control and direction of the business and affairs of said successor company which he had theretofore exercised with respect to C. A. Schneider's Sons, including the matter aforesaid; that the defendant, District of Columbia, undertook to supervise and inspect the plans and specifications according to which the theatre was to be constructed, as well the construction of the theatre, and each and every part thereof, and to prevent it from being constructed in such manner that it would be unsafe or insecure for the purpose for which it was intended; that, after the construction of the theatre, the defendant, Knickerbocker Theatre Company, as owner, and the defendant, Crandall, individually and as president, general manager, director and controlling stockholder of the theatre, had direct charge, supervision and direction of the management and operation of the theatre, and operated and maintained it and received large benefits and profits therefrom.

It is further alleged in the declaration that it was the duty of the defendant, Geare, to use reasonable care and diligence in designing the theatre and in supervising its construction, and not to design or allow it, or any part thereof, to be constructed in such a manner as to make it unsafe for the use and purpose for which it was intended; that it was the duty of defendant, Ford, and of C. A. Schneider's Sons, and the successor thereof, to use reasonable care and diligence in designing, fabricating, furnishing and installing the structural steel and iron work supporting the roof, ceiling and balcony of the theatre, so that said steel and iron work would safely support the roof, ceiling and balcony of the theatre; that it was the duty of defendant, District of Columbia, to use reasonable care and diligence in supervising and inspecting the plans and specifications, as well as the construction of said theatre, and every part thereof, and not to permit the same to be constructed in such manner that it would be unsafe or insecure for the purpose for which it was intended; that it was the duty of defendants, Knickerbocker Theatre Company and Crandall, to cause said theatre, and every part thereof, to be so constructed that it would be safe and secure for the purpose and use for which it was intended, and to keep and maintain the

theatre in a safe and secure condition, so that persons entering the theatre as patrons would not be injured in consequence of the building being unsafe and insecure, and not to invite or permit the public, including plaintiff's intestate, into the theatre when the same was in an unsafe and dangerous condition.

The declaration then proceeds, as follows:

"Yet the defendants, and each of them, negligently and carelessly failed to perform their duties in the premises; and the defendant Reginald W. Geare, negligently and carelessly did plan and design said theatre and supervise the construction thereof; and the defendant, John H. Ford, C. A. Schneider's Sons and the successor thereof, the defendant Union Iron Works Company, negligently and carelessly did design, fabricate, furnish and install the structural steel and iron which supported the roof, ceiling and balcony of said theatre; and the defendant, District of Columbia, negligently and carelessly supervised and inspected the plans and specifications as well as the construction of said theatre, and negligently and carelessly permitted said theatre to be so constructed as to be unsafe and insecure; and the defendants, Knickerbocker Theatre Company and Harry M. Crandall, negligently and carelessly did allow said theatre, its appurtenances and equipment, to be so constructed as to be unsafe and insecure, and did fail to keep and maintain said theatre, its appurtenances and equipment, in a safe and secure condition, but kept and maintained said theatre, its appurtenances and equipment, in an unsafe and insecure condition, and did, while they knew of its unsafe and insecure condition, invite and allow the decedent, with many other persons, to enter said theatre as a patron, so that while the decedent was on the day and year aforesaid occupying one of the seats in said theatre as a patron thereof and a spectator of the exhibition therein being presented, the roof, ceiling and balcony of said theatre collapsed and fell, and through the negligence and carelessness of the defendants, and each of them, and as a result thereof, the decedent, without any negligence on his part, was then and there killed."

To the above declaration, the defendant, District of Columbia, filed the general issue plea of "not guilty;" and the defendants, Crandall, Geare, Ford and Union Iron Works Company filed separate motions to strike out or dismiss the declaration, each such motion alleging, as grounds thereof, the following:

"1. Several separate and distinct alleged causes of action are joined in a single count to the prejudice of the defendant.

"2. Separate and distinct causes of action against separate and distinct defendants are joined to the prejudice of the defendant.

"3. Misjoinder of alleged causes of action against separate and distinct defendants.

"4. Misjoinder of parties defendant."

The motions have been fully and ably argued by counsel, and certain typewritten briefs have been submitted; all of which arguments have been carefully considered by the Court.

The contentions of defendants are sufficiently indicated in the above quoted extracts from the motions, and they amount, in substance, to this, that the torts complained of are not joint, even though they may be related; whereas, the plaintiff insists that a joint action is maintainable where the concurrent, related, or successive negligence of several persons, combined together, results in an injury to a third person.

The following is stated in 38 Cyc. p. 488, title "Torts:"

"Production of Single Injury.—Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it. It has been said that 'to make tort-feasors liable jointly there must be some sort of community in the wrong-doing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury.' * * *

"Comparison of Culpability.—The degree of culpability of each of the wrong-doers cannot be compared; nor will their liability be affected by the relative degree of negligence or of the care required. It is sufficient to support a recovery if the negligence of both be a contributory cause, even though one owes to the person injured a higher degree of care, and even though there be a different degree of negligence by each. Either or both are alike responsible."

Among the cases cited in support of the proposition, *supra*, is that of Consolidated Ice Machine Co. v. Keifer, (134 Ill., 481; 10 L. R. A. 696).

In that case, the Ice Machine Co. undertook to erect a refrigerator plant for the Brewing Company, at its brewery, which included a large iron tank. The Brewing Company was to fix the location for the plant, and make and put in proper supports for the tank; all of which it did; and, thereupon, the superintendent of the Ice Machine Company told the president of the Brewery Company that the structure so prepared, including the truss upon which one side of the tank was to be placed, the other side thereof to be placed upon one wall of the engine room, would not support the tank, that it was insufficient; but the president replied it would do; and so the tank was put in place. After it was up, the superintendent of the Ice Machine Company directed the intestate, with others, to go upon the roof of the engine house, and fit in it the heater. The tank, at the time, was being filled with water, and while the intestate was on the roof, the truss gave way, and the tank fell, taking with it part of the roof of the engine house, and precipitating Keifer to the floor of the engine-room, whereby he was killed.

It was there claimed that if either defendant had been guilty of negligence, resulting in injury to the intestate, it was their several and not joint negligence, and, accordingly, that the negligence of one could not be charged against the other.

In the opinion in the case, the court quotes pertinent extracts from

Cooley on Torts, Hilliard on Remedies for Torts, Deering on Negligence, Wharton on Negligence, and Shearman & Redfield on Negligence; as well, also, cites decisions from divers State courts in support of its conclusion, and thus stated its holding:

"where the negligence of two or more persons directly concurs to produce the injury, although one may have undertaken one part, and another another part, and the negligence occurs in the performance of each of the several parts of the work, which directly contributes to produce the injury, all will be jointly liable. The test seems to be whether or not the negligence of each directly contributed to producing the injurious result."

Counsel for plaintiff cite both State and Federal decisions in support of the general underlying principles upon which reliance is placed to maintain the asserted joint liability of the defendants.

Defendants, with equal confidence, cite both State and Federal decisions which they insist hold to the contrary; and, among the cases so cited, and the one most nearly in point, and holding, apparently, in direct opposition to the doctrine announced in the case of *Ice Machine Company v. Keifer*, *supra*, is that of *Cole v. Lippitt, et al.*, (22 R. I. 31).

In the case just mentioned, the plaintiff brought his action against the owner, builders, and supervising architect of a house for negligence in its construction, whereby the decedent lost his life; and demurrer was interposed to the declaration, upon the ground that the defendants were improperly joined in the same action, in respect of several and distinct, and not joint, breaches of duty and causes of action.

The demurrers were sustained, the Court, in its opinion, stating:

"These several charges of negligence are quite different in kind and relation, but the plaintiff claims that they constitute a joint liability, because the negligence of each defendant combined with others to produce the injury. * * * The fact that the effects of several wrongful acts are produced at the same time and place cannot affect the question. * * *

* * * * *

"* * * A joint liability is not made out by patching together individual liabilities which may arise from different relations to the same transaction."

It is apparent, however, that there is a lack of uniformity in the State decisions concerning the rule, as indicated by the holding in *Consolidated Ice Machine Co. v. Keifer*, *supra*; to which may be added *McBridge v. Scott*, (125 Mich. 517).

Certain decisions of the Court of Appeals of this District have been cited by counsel, but it does not appear therefrom that the exact question here present has been passed upon in such way as to fur-

nish a conclusive rule of decision applicable and controlling in the instant case; and, for that reason, this Court feels at liberty to reach a judgment as to what seems to it to be the rule of decision best sustained by principle, reason and precedent.

The charge involved in the suit is one of exceeding gravity; it alleges acts of concurring, related and/or successive negligence, all of which, combined together, so it is contended, produced the result, namely, the collapse of the roof, ceiling and balcony of the Knickerbocker Theatre, by reason whereof, plaintiff's intestate, then in attendance at the theatre as a patron, met his death.

The question involved is of exceeding moment and importance both to those who have been damaged and injured by the calamity, and to those who are now asked to respond in damages for the unfortunate and distressing results which followed the disaster.

Upon careful consideration of the entire matter, the Court has reached the conclusion that the declaration states a cause of action against the defendants; and, accordingly, that the several motions to dismiss herein should be *overruled*.

In conclusion, the Court deems it proper to note that it understands that upwards of fifty (50) similar suits, filed and now pending in this Court, involve substantially the same question of law as is here ruled upon and disposed of. In view of the importance of the question involved, as well the fact that there appears to be a lack of uniformity in the decisions concerning the same matter in the courts of other jurisdictions; and, perhaps more important, in view of the further fact that the Court of Appeals of this District, apparently, has not heretofore exactly and precisely laid down a rule of decision in such cases; it would seem quite proper, in the interest of economy of time, labor and expense, that the question itself, and which lies at the very threshold of all of the pending cases to which reference has just been made, be passed upon by the Court of Appeals, and, to that end, that application be made to that Court for the allowance of a special appeal; and, for that purpose, reasonable opportunity will be afforded counsel for the defendants to make such application, if so advised.

Let appropriate order be entered herein overruling the several motions to dismiss, with leave to plead within twenty (20) days.

A. A. HOEHLING,

Justice.

March 27, 1923.

Filed Nov. 14, 1923. Morgan H. Beach, Clerk.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas in a certain suit in said Supreme Court between Nicholas Apfelbaum, as Administrator of the Estate of Rose Urdong, De-

ceased, plaintiff, and Harry M. Crandall, Frank L. Wagner, Union Iron Works, et al., defendants, Law No. 67,344, which suit was removed to the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

Copy of Memorandum Opinion filed on the 27th day of March, 1923, in the case entitled Guy Sturgis, Administrator, etc., plaintiff, vs. Knickerbocker Theatre, Law No. 67,327,

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Court of Appeals, so that you have the same, together with this writ, before the said Court of Appeals forthwith.

Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the Fourteenth day of November, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of
the District of Columbia,*
By MONCURE BURKE,
Assistant Clerk.

[Endorsed:] Court of Appeals of the District of Columbia, October Term, 1923. No. 4033. Frank L. Wagner, appellant, vs. Nicholas Apfelbaum, as administrator of the estate of Rose Urdong, deceased. Writ of certiorari. Filed Nov. 14, 1923. Morgan H. Beach, Clerk.

Supreme Court of the District of Columbia.

UNITED STATES of AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, do hereby certify in obedience to the writ of certiorari hereto attached and returned herewith, that the foregoing is a true and correct copy of the "Memorandum Opinion filed on the 27th day of March, 1923, in the case entitled Guy Sturgis, Administrator, etc., plaintiff, vs. Knickerbocker Theatre, Law No. 67327," omitted from the record heretofore transmitted to the Court of Appeals of the District of Columbia in the case of Nicholas Apfelbaum, as Administrator of the Estate of Rose Urdong, deceased, plaintiff and Harry M. Crandall, Frank L. Wagner, Union Iron Works, et al., defendants, Law No. 67344.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of November, 1923.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

EW.

[Endorsed:] No. 4033. Frank L. Wagner, appellant, vs. Nicholas Apfelbaum, as administrator of Rose Urdong, deceased. Return to writ of certiorari. Court of Appeals, District of Columbia. Filed Nov. 26, 1923. Henry W. Hodges, Clerk.

(1159)

DEC 3 - 1923

Henry M. Hodges

CLERK

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1923
No. 4033

No. 9 Special Calendar
January Term 1924

No. 38, SPECIAL CALENDAR

FRANK L. WAGNER, *Appellant*,
vs.

NICHOLAS APFELBAUM, *as Administrator of the Estate
of ROSE URDONG, Deceased.*

BRIEF FOR APPELLANT

W. C. SULLIVAN,
Attorney for Appellant.

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IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1923

No. 4033

No. 38, SPECIAL CALENDAR

FRANK L. WAGNER, *Appellant*,
vs.
NICHOLAS APFELBAUM, *as Administrator of the Estate*
of ROSE URDONG, Deceased.

BRIEF FOR APPELLANT

STATEMENT OF FACTS

This case grows out of that most unfortunate calamity known as the Knickerbocker Theater disaster. Declaration was filed in the court below, and motion made to strike out. The learned trial justice filed a memorandum opinion overruling such motion but no order was at that time entered, and leave was granted to the

appellant to file a demurrer without prejudice to his said motion to strike out. He then demurred, and both the motion to strike out and the demurrer were overruled, the Court suggesting in each of its opinions, on the motion and on the demurrer, the making of application to this Court for a special appeal, which suggestion was acted upon and the application granted.

In opposition to the motion to strike out, it was contended that the rules forbidding such joinder of parties and causes as we have here is applicable only in cases of nuisance and that the present is a negligence case and not one of nuisance; while the demurrer was overruled on the ground that the case was one of nuisance rather than of negligence.

ANALYSIS OF DECLARATION

The declaration is in two counts, and names five defendants, Harry M. Crandall, Frank L. Wagner the appellant, Union Iron Works, John H. Ford, and District of Columbia. The first count, after stating preliminarily that, prior to January 28, 1922, the Knickerbocker Theatre building was *caused* to be erected, which building was *intended* to be *and was*, on January 28, 1922, used as a motion picture theatre, which the public generally, including plaintiff's intestate were *intended to be and were* invited to enter, and did enter, makes the following several, separate and distinct allegations of fact and duty, by way of conclusion:

1. That the plans, specifications, design and structure of the building were prepared and performed under the supervision and direction of the defendant Crandall, whose duty it was during the planning, designing and construction to have the plans and specifications, designing and construction prepared and

performed in such manner as that the building when erected should be safe for such persons as might thereafter be therein.

2. That the appellant was the general contractor engaged *for the purpose of causing* the building to be erected and *did* as such general contractor *cause it to be erected*; that it became, was and continued to be his duty to *have the building constructed* in such a careful and skillful manner as that when erected it should be safe for such persons as might thereafter be therein.

3. That the iron and steel work were designed, fabricated, furnished and installed by the defendant Union Iron Works Company, under the supervision and direction of the defendant Ford, said work having been originally undertaken by C. A. Schneider's Sons, acting under the direction and supervision of the defendant Ford, which concern was subsequently succeeded by the Union Iron Works Company, assuming all of its rights and liabilities; that it became, was and continued to be the duty of the defendants Ford and the Union Iron Works so to design, fabricate, furnish and install the iron and steel work as that the building when constructed should be safe for such persons as might thereafter be therein.

4. That the District of Columbia was a municipal corporation charged with the supervision of all building operations in the District of Columbia and with the duty of seeing to it that structures therein erected were properly and safely constructed; and that it became, was and continued to be its duty so to supervise the planning, designing and construction of the building as that the same when completed should be safe for such persons as might thereafter be therein.

The only charge of negligence in the first count is found in the following language:

“Yet nevertheless, the said defendants and each of them, failed in their duties in the premises, in that the defendant Crandall negligently failed to have the plans and specifications, design and construction of said building prepared and performed in such manner as that the same was safe for such persons as might be in said building when completed; the defendant Wagner negligently failed to have said building constructed in such a careful and skillful manner as that said building was safe for such persons as might be in said building when completed; the defendants Ford and Union Iron Works Company negligently failed in their duty so to design, fabricate, furnish and install the iron and steel work in said building as that said building was safe for such persons as might be in said building when completed; and the defendant District of Columbia negligently failed so to supervise the designing, planning and construction of said building as that said building was safe for such persons as might be in said building when completed; said building was completed prior to the said 28th day of January, 1922, but as a result of the negligence of the defendants the same was, when erected, unsafe and in a dangerous and defective condition, and continued so to be.”
(Italics ours.)

The first count then proceeds with its efforts to connect the said charges with the death of the plaintiff's intestate by the further allegation that, on January 28, 1922, she was in the building for the purpose of witnessing a motion picture exhibition, when the roof, ceiling and balcony fell “as a result of the negligence of the defendants.”

The only difference between the first and second counts of the declaration is to be found in the interjection of the further allegation in the second count that, on January 28, 1922, the building was operated for profit by the defendant Crandall jointly with the Knickerbocker Theatre Company, thus making the latter part of the foregoing excerpt read as follows, the interjected language being italicized:

“Said building was completed prior to the said 28th day of January, 1922, *and on said day was operated for profit by the defendant Crandall jointly with the Knickerbocker Theatre Company, of Washington, District of Columbia, a corporation,* but as a result of the negligence of the defendants the same was, when erected, unsafe and in a dangerous and defective condition, and continued so to be.”

The sole effect of this italicized expression—which is the only difference between the two counts—is to most explicitly and directly emphasize the fact that the building had been completed and turned over to the owners prior to the occurrence complained of.

THE ASSIGNMENTS OF ERROR

Are that the trial court erred in the several particulars and respects following, namely:

1. In not holding that the declaration presents a misjoinder of counts.
2. In not holding that the declaration presents a misjoinder of causes of action in different counts.
3. In not holding that the declaration presents a misjoinder of causes of action in each count.
4. In not holding that the declaration presents a misjoinder of parties defendant in different counts.

5. In not holding that the declaration presents a misjoinder of parties defendant in each count.

6. In not holding that the declaration and each count thereof is duplicitous.

7. In not holding that the declaration and each count thereof fails to state facts constituting a cause of action against the appellant.

8. In not holding that the declaration and each count thereof fails to state facts showing negligence on the part of the appellant.

9. In not holding that the declaration and each count thereof fails to state facts constituting negligence.

10. In not holding that the declaration and each count thereof fails to show any liability of the appellant for any negligence complained of therein.

11. In not holding that the declaration and each count thereof fails to show that the appellant had any charge or control whatever over the building at the time when the roof, ceiling and balcony fell as complained of in the declaration and each count thereof.

12. In not holding that the declaration and each count thereof shows that the appellant was not in control or charge of the building at the time when the roof, ceiling and balcony fell as complained of therein.

13. In not holding that the declaration and each count thereof fails to show a state of facts which will permit of the application of the doctrine *res ipsa loquitur* as to the appellant.

14. In not holding that the declaration and each count thereof shows a state of facts rendering the doctrine *res ipsa loquitur* inapplicable as to the appellant.

15. In holding that the declaration states a cause of action by way of nuisance.

16. In holding the doctrine *res ipsa loquitur* applicable to the facts of this case as pleaded.

17. In holding that the declaration or either count thereof states a cause of action against the appellant notwithstanding the failure therein to charge that he had any charge or control whatever over the building at the time when the roof, ceiling and balcony fell as complained of in the declaration and each count thereof.

18. In overruling appellant's motion to strike out the declaration and each count thereof.

19. In overruling appellant's demurrer to the declaration and each count thereof.

The motion to strike out (Rec., p. 6) assigned six specific points, involving duplicity, and misjoinder of counts, causes of action and parties.

The demurrer (Rec., pp. 7-8) assigned thirteen grounds, repeating the grounds of misjoinder assigned in the motion to strike, and adding as additional grounds failure of the declaration to state a cause of action, to state facts showing negligence on the part of the appellant or for which he was responsible, or to show that he had any charge or control over the building at the time of the calamity, and the further proposition that the doctrine *res ipsa loquitur* is not applicable to the state of facts shown by the declaration. (Rec., p. 7.)

The assignments of error raise the further specific question, whether the declaration states a cause of action as for a nuisance, which question was not raised by any of the parties in the trial court, though the decision of that court on the demurrer was rested entirely upon it.

The case thus presents the following

POINTS AND AUTHORITIES

- I. There is a misjoinder of counts.
- II. There is a misjoinder of causes of action.
- III. There is a misjoinder of parties.
- IV. The declaration is duplicitous.
- V. No facts are stated constituting a cause of action against the appellant, or showing negligence on his part or for which he is responsible.
- VI. The doctrine *res ipsa loquitur* is not applicable.
- VII. The case is not one of nuisance.

I—IV

The first four points, which present the grounds of the motion to strike out, are: That there is a misjoinder of counts, of causes of action presented by different counts and as well in each count, of parties defendant in different counts and in each count, and that the declaration and each count thereof is duplicitous.

Each count, in so far as it charges anything at all, charges four separate and distinct causes of action, unconnected in any way, and makes such charges in a single count, as of a joint tort, and the second count adds a fifth cause of action, that is to say, (1) on the part of Crandall in supervising and directing the preparation and performance of the plans, specifications and structure; (2) on the part of Wagner in causing the building to be erected; (3) on the part of Ford and the Union Iron Works Company in designing, fabricating, furnishing and installing the iron and steel work; (4) on the part of the District of Columbia in supervising the planning, designing and construction; and, as the additional cause of action set up in the second

count, (5) on the part of Crandall jointly with the Knickerbocker Theater Company, which is not named as defendant, in operating a theater building which was in an unsafe, dangerous and defective condition.

The work of designing the building, that of causing its construction, that of designing, furnishing and installing iron and steel work, that of supervising the planning, designing and construction, and that of operating a theater in the building, are in no proper or legitimate sense joint acts of the several parties concerned therein, or concurrent acts constituting a jointure of action as that term is used in the cases, nor is jointure or concurrence of action anywhere alleged.

While the declaration does recite that, at some indefinite and undisclosed time prior to January 28, 1922, the Knickerbocker Theater building was *caused* to be erected, that it was *intended* to be, *and was* on that day used as a motion picture theater to which the public generally including plaintiff's intestate were *intended to be and were* invited to enter, it gives not the slightest idea as to how long prior to that day the building was erected, who intended that it should be so used or by whom it was intended to be used for the purpose stated, by whom the invitation to enter was extended, or that the appellant or indeed any of the other defendants (unless perhaps the defendant Crandall and even he only inferentially), ever knew the purpose for which the building was to be used, or had any part in the invitation set out, much less indeed that the appellant or any of the defendants, other than possibly and inferentially Crandall, participated in the giving of the said invitation.

The mere fact that the plans, specifications, design and structure of the building were prepared and per-

formed under the supervision and direction of one party; that another party was general contractor engaged for the purpose of *causing* the building to be erected and did *cause* it to be erected, with no assertion even that he erected it, participated in its erection or had anything to do therewith other than to *cause its erection*, and without so much as alleging that he knew the purpose for which it was to be used when erected; that still another party designed, fabricated, furnished and installed the iron and steel work, without any statement of knowledge on his part of the purpose for which the building was intended to be used; and that another party, a municipal corporation, was charged with the supervision of all building operations in the District of Columbia and of seeing to it that structures therein erected were properly and safely constructed, without any statement of its knowledge of the purpose for which the building was intended to be used, or any statement that any of the said parties other than possibly the one under whose supervision and construction the plans, specifications and design were prepared ever saw any of them, certainly does not justify joining all such parties in one count of a declaration as joint tort feasers. The additional facts set out in the second count that the first-mentioned party, together with a corporation not made a party defendant, were operating the building for profit on the day of the accident, detracts from rather than adds to the strength of the plaintiff's case as a joint one.

Whatever may be said in this connection, however, as to any of the other defendants, the declaration certainly is not sufficient to hold the appellant jointly with the others. His only connection with the enterprise is said to have been to *cause the building to be erected*.

A proper performance of that duty did not necessarily require that he should ever see the plans, specifications, design, site or structure, whether before, during or after its erection. He might have been employed solely for the purpose of calling for bids according to the plans and specifications and upon inspection of them at the office of the architect; to receive and compile the bids; to turn them over to the architect or owner, and to announce the successful bidders according to the directions of the architect and owner. This might have been the beginning and the end of his duty and connection in the premises. If he had anything to do with the actual work of construction and erection, then the declaration should have pleaded, not that he *caused* the building to be erected, but that he *erected* it, or at least that *it was erected under his supervision and direction*. The declaration does not so state, and these averments cannot be aided by inference or conjecture. Indeed, the absence of such statement in the declaration is sufficient ground for sustaining the demurrer directed thereto.

“The rule is fundamental, *verba fortius accipiuntur contra proferentem*—language is to be construed against the composer. He has his choice of words. If he chooses to employ doubtful or ambiguous phrases when unmistakable language was ready to his hand, it is fair to assume that he did so because he did not quite dare to use the stronger expression. His interest prompted him to use the strongest expressions the truth would warrant; it must be assumed that he has done so.” *Mearns v. Harris*, 45 App. D. C., 536, 539.

“What is the rule of construction in such a pleading? It is, that it is construed most strongly against the defendant. This is the rule laid down

by Chitty, 1 Ch., 578, in which he is supported by numerous authorities. And the reason assigned for this rule of construction is, that it is a natural presumption, that the party pleading will state his case as favorably as he can for himself. And if he do not state it with all its legal circumstances, the case is not in fact favorable to him; and the rule of construction in such case is, that if a pleading has on the face of it two intendments, it shall be taken most strongly against the defendant; that is, says he, the most unfavorable meaning shall be put upon the plea; a rule which obtains also in other pleadings." *United States v. Linn, et al.*, 1 How., 104, 110.

"Where there is want of certainty in an allegation of a pleading, the general rule is, that the sense of the averment is to be taken most strongly against the pleader." (Citations.)

Maenner v. Carroll, 46 Md., 193, 215;
Tennessee Coal & Iron R. R. v. Smith, 171 Ala., 251, 260;
Crawford, et al., v. McMickens, 190 Ala., 102, 104;
Stewart v. Smith (Ala.), 78 So., 724, 726;
Mobile Light & R. Co. v. Ellis, 92 Ala., 106;
Marcovitz v. Hergenrether, 134 N. E. (Ill.) 85, 87;
Marples v. Standard Oil Co., 71 N. J. L., 352, 354;
Old Colony Trust Co. v. Atlanta, etc., R. Co., et al., 264 Fed., 355;
McIntyre v. Hauser, 131 Cal. 11;
Meriden Britannia Co. v. Whedon, 31 Con. 118;
Herrin, et al., v. Brown, 44 Fla., 782;
Ayer v. Lord Tie Co. v. Keown, 122 Ky., 580;
McFarland's Administratrix v. L. & N. R. R. Co., 130 Ky., 172;
Bartlett v. Prescott, 41 N. H., 493;
Hanford v. Duchastel, 87 N. J. L., 205;
Vaughan, et al., v. Everts, 40 Vt., 526.

Furthermore, it is not alleged that the appellant knew of the defects, whatever they were; or that his knowledge and training fitted him to pass upon the question of sufficiency, or that anything which he undertook required him to possess such knowledge. The only charge of negligence against him is that "the defendant Wagner negligently failed *to have* said building constructed in such a careful and skillful manner," etc. If by this language is meant the same thing as causing the building to be erected, sufficient has been said. If more than that is meant, the facts stated do not support the conclusion so attempted to be drawn from them. In either event, liability on his part is not shown.

It is said that the negligence of Crandall consisted in his failure to have the plans, specifications, design and structure prepared and performed in such manner as that the same was safe, and that the negligence of Wagner consisted in his failure to have the building constructed in such manner as that the same was safe. Did the failure of Wagner consist in following, or in departing from, the plans, specifications and design as to which negligence is so charged against Crandall? In either case, what was the jointure or concurrence of action or of neglect?

If the intent was to charge the carrying out of improper plans, specifications and design, what was wrong with them? If it was the intent to charge a departure, in what respect were they departed from? If defective plans were followed instead of being departed from, what is the reason for charging Wagner with liability? None of these things is disclosed by the declaration, yet each of them is required to be explicitly set forth.

But whether he is to be charged with following or not following plans, specifications and design, what connection is there between his wrong and that of any of the other defendants? A master may be liable for the neglect of his servant, but not jointly with him, and that is the utmost that can be said of the charge here. It is the duty of an owner or of a master to use due care, but an owner, when liable at all, is not liable jointly with his contractor, nor is the contractor liable jointly with the owner. They cannot be joined in the same count or declaration. And this is equally true as between an owner, master or general contractor on the one hand, and a servant, employee or sub-contractor on the other.

What is the connection between Wagner's supposed negligence, as such general contractor, and that of Ford and the Union Iron Works with respect to designing, fabricating, furnishing and installing the iron and steel work? There is not a word in the declaration to show that Wagner had anything whatever to do with the designing of the iron and steel work, or in what way it was unsafely designed, or that he knew thereof, or that there was anything in his relation to the work which made it his duty to so know. The same remarks apply with equal force to the fabrication, to the furnishing and to the installation of the iron and steel work. The duties of Wagner as general contractor are no where in the declaration or either count thereof defined, specified, or even suggested or hinted, other than in the expression that he was "engaged for the purpose of causing said building to be erected," and that he "failed to have said building constructed in such a careful and skillful manner," etc. Were the designers, fabricators, furnishers and installers of the

iron and steel work his servants or employees, subcontractors of his or of the owners, or independent contractors of one or the other or both of them? All this is left to conjecture. It is essential that it be specifically set forth in the declaration in order that the Court may determine the liability of the general contractor for the act of such designer, fabricator, furnisher and installer; certainly in order that it may determine whether or not both may be joined in one declaration or count.

What connection, what jointure or concurrence of act or omission, can possibly be claimed between one "engaged for the purpose of causing said building to be erected" and "a municipal corporation charged with the supervision of all building operation within the territorial limits of the District of Columbia and charged with the duty of seeing to it that the structures therein were properly and safely constructed?"

Finally, what authority can there possibly be for uniting as joint tort feasons such a general contractor with those who jointly operate a theater in the building after it has been completed and turned over to the owner?

The declarations now before the Court are of two classes, which will be designated for purposes of convenience as the Sturgis and Urdong cases, the present belonging to the latter class.

In the various particulars and respects hereinbefore adverted to, the Sturgis and Urdong cases differ radically. Not only is the appellant not a part to any of the Sturgis cases, but each of the declarations in them contains the vital allegation, which is omitted here, that the building "was equipped and provided with seats for many hundreds of persons and designed

and intended, *as all the defendants well know*”—appellant not being a defendant in any of the said suits —“to be used for profit as a moving picture theater and a place of amusement and entertainment, to which the public generally were invited and were to be charged for admission.”

Further comparing the two classes of declarations we find marked differences in them in most substantial respects, *e. g.*:

1. Instead of the charge that the plans, specifications, design, and structure were prepared and performed under the supervision and direction of Crandall and that Wagner was engaged for the purpose of causing the building to be erected, the Sturgis declarations charge that the said theater building was *constructed* and caused to be constructed by the Knickerbocker Theater Company (which is named as defendant therein) and Crandall, and that the latter had *active control and direction* of the construction of said theater; that, in connection with the construction of said theater, Geare *at the direction and under the employment of the Company and Crandall, undertook and assumed* to design and draw the plans and specifications for its construction and to *exercise general direction and supervision* of the construction.

2. As before noted, Wagner is not even named in any of the Sturgis declarations, and the Knickerbocker Theater Company and Geare are not defendants in the Urdong declarations.

3. Instead of the charge here that the iron and steel work were designed, fabricated, furnished and installed by the Union Iron Works Company under the supervision and direction of Ford, the Sturgis declarations charge:

“That the defendant, John H. Ford, acting for and on behalf of C. A. Schneider’s Sons, a concern over the business of which he exercised active control and direction, *with the knowledge and consent and under the direction of the defendants Knickerbocker Theater Company and Harry M. Crandall*, undertook and assumed to design, fabricate, furnish and install the structural steel and iron to be used in said theater for supporting the roof, ceiling and balcony thereof; that while said theater was in the course of construction, the defendant, Union Iron Works Company, was incorporated and succeeded to all the interests, property and business of C. A. Schneider’s Sons, including the designing, fabricating, furnishing and installation of the structural iron and steel work in said theater, the defendant, John H. Ford, continuing the active control and direction of the business and affairs of said Union Iron Works Company which he had theretofore exercised with respect to C. A. Schneider’s Sons, including the designing, fabrication, furnishing and installation of said structural iron and steel work in said theater.” (Italics ours.)

4. Instead of the charge here that the District of Columbia was a municipal corporation charged with the supervision of all building operations in the District of Columbia and with the duty of seeing to it that structures therein were properly and safely constructed, the Sturgis declarations charge:

“That the District of Columbia, *undertook to supervise and inspect* the plans and specifications according to which the said theatre was to be constructed, as well as the *construction of said theatre and each and every part thereof*, and to prevent said theatre from being constructed in such manner that it would be unsafe or insecure for the purpose for which it was intended.” (Italics ours.)

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All of the Sturgis declaration at least make the attempt, which the Urdong declaration disdain, to tie the defendants together to some extent by the allegations that the Knickerbocker Theater Company and Crandall *actually* constructed the building, that Geare's part therein was "at the direction and under the employment" of the Company and Crandall, and that Ford's part therein was "with the knowledge and consent and under the direction" of the Company and Crandall.

It is not our purpose or province to say or argue here that either the motions to strike out or the demurrers in the Sturgis cases were properly or improperly overruled, or to do more than invite the attention of the Court, in this connection, to the fact that the learned trial Justice overlooked the vital differences between the two sets of declarations, and that even though his decisions be correct with regard to the Sturgis case, they are incorrect as to the Urdong declarations.

THE GROUND OF THE DECISION OVERRULING THE MOTION TO STRIKE OUT

The learned trial Justice rested his decision overruling the motion to strike out the declaration upon the supposed principle that "a joint action is maintainable where the concurrent, related, or *successive* negligence of several persons, combined together, results in an injury to a third person." (Italics ours.) Citing in support thereof 38 Cyc. 488, Note 14; Id. 489, Note 15; Id. 490, Notes 22 and 23; Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 10 L. R. A. 696, and McBride v. Scott, 125 Mich. 517.

It will be observed that the supposed principle applies in the case of "concurrent, related, or *successive* negligence." It is essential to the maintenance of the present declaration against the motion to strike out that the principle in question include not merely concurrent and related, but also unrelated successive negligence, for on the face of the declaration the alleged negligence of the several defendants was not concurrent and there was no relation between them, but it was successive; yet, no one of the authorities relied upon by the learned trial Justice, including the numerous cases cited in Cyc, each of which has been examined by us, goes so far.

The propositions laid down by the annotators of Cyc, in the language quoted in the opinion of the trial court, are:

"Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it" (but it is not said that they are jointly liable, or may be sued in a single suit); "it is not necessary that they be acting together in concert in order to make them jointly liable if their *concurring* negligence occasions the injury;" and that "the degree of culpability of each of the wrongdoers cannot be compared, nor will their liability be affected by the relative degree of negligence or of the care required of them." (Italics ours.)

The text quoted does no more than declare that concurring negligence creates joint liability, and that the combining of the acts or negligence of several with the consequent production, directly, of a single injury is

sufficient to render "each responsible for the entire result." It does not declare that such combination justifies a joint action against the several; nor does it support the proposition that, even in separate actions, the *successive* negligence of several persons,—whether related or not—may be made the basis of liability of all of them, even in independent suits against each. Whether so or not, of course, is foreign to our present inquiry.

That the text referred to does not mean, as it does not say, that separate and independent acts or negligence of several even when *combining* to produce *directly* a single injury will support a single action is exemplified by the fact that elsewhere in the same work, we find abundant authority to the contrary, and in direct support of the contention of the appellant here.

"If defendant's act was several when committed, it cannot be made joint because of a consequence which followed in connection with the result of the same or similar acts done by others."
38 Cyc. 484.

And this is true, even though "it is difficult to separate the injury done by each from that done by the others." (Ibid.) Such fact "furnishes no reason for holding that one tortfeasor should be liable for the acts of others with whom he is not acting in concert." (Ibid.)

An analysis of the cases cited in support of the text quoted from Cyc by the learned trial Justice discloses that they are far from establishing the proposition so stated. True, a few, but very few of them do lay it

down as a rule that where the negligence attributed to all defendants is alleged to have produced a single indivisible injury, they are in contemplation of law joint tortfeasors, though acting independently of each other, the language of the Courts making no distinction between concurrent, related or successive negligence, but in each one of such cases the facts pleaded and/or proved, according to the case, showed that the negligence of all parties was concurrent, and not successive. On the other hand, many of the cases so cited by the annotator distinctly recognize the necessity of such concurrence, and others repudiate entirely the doctrine as attempted to be applied to the facts of a case such as the present one.

In addition to the excerpts quoted from Cyc, the learned trial Justice cited only the two cases of Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, and McBride v. Scott, 125 Mich. 517, discussing the former at length and merely citing the latter. These were both cases of buildings in the course of erection, and therefore still under the control of the contractor.

Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, however, presented no question of pleading, but solely one whether the evidence would support a recovery against two defendants jointly. An Ice Machine Company undertook to erect a refrigerator plant for a Brewing Company, at its brewery, including a large iron tank. The Brewing Company was to fix the location for the plant, and make and put in supports for the tank, which it did. The superintendent of the Ice Machine Company informed the president of the Brewing Company that the structure so prepared by the latter, including the truss upon which one side of the tank was to be placed, was insufficient and never would sup-

port the tank, but the president replied that it would do, and without further objection the Ice Machine Company put the tank in place, and its said superintendent directed the intestate, with others, to go upon the roof of the engine house and fit in it the heater. At the time, the tank was being filled with water, and while the intestate was on the roof the truss gave way, and the tank fell, taking with it part of the roof, and precipitating the intestate to the floor below, where he was killed.

In a suit against the Ice Machine and Brewery Companies as joint tort feassors, the Court said:

“Under the state of facts alleged and shown, it was the duty of each of the defendants, in the performance of their several parts of the work, to use reasonable care to avoid injury to the servants of either, and to third persons. * * * That *the tank fell because of the insufficient support furnished by the brewing company* is determined by the judgment of the Appellate Court. But if this were not so, there is evidence tending to show it was wholly insufficient, and that *knowledge thereof was brought home to the brewing company before the tank was placed thereon*. It is, however, claimed, that if either defendant has been guilty of negligence resulting in injury to the intestate, it is their several negligence, and cannot be charged against the other defendant. *The evidence shows, beyond dispute, that both defendants, in respect to the matters being considered, were acting together to accomplish a common purpose*. It is true the work was apportioned among them; but this does not change the common purpose and object of their several acts. *The brewing company, as we have seen, was to fix the location of the plant, and provide the truss or support for the tank. When this was done, the*

ice machine company was to erect a plant, and put the tank upon the support so furnished. The parts acted by each company looked alone to the erection and completion of the refrigerator plant." (Italics ours.)

After reviewing text and case law, the Court said further :

"Where the negligence of two or more persons *directly concurs* to produce the injury, although one may have undertaken one part and the other another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be jointly liable. *The test seems to be, whether or not the negligence of each directly contributed in producing the injurious result.* Here, the brewing company intended that its defective support should be used as it was used, and *it having express notice of the insufficiency thereof*, it became responsible to any one injured, while exercising due care, from the use to which it was thus applied by its direction and supervision; and the ice machine company, *with knowledge of its insufficiency*, went on and placed the tank thereon, and thereby became responsible for injuries to any of its servants it might send to work upon the tank, without giving them notice of the danger to which they were exposed. *Here, the negligence of these defendants directly concurred in producing the death of Keifer."* (Italics ours.)

The case, thus, was one of concurrent negligence. There was an arrangement between each of the parties as to the part each was to do, the brewery company was to prepare the support for the ice machine and the ice machine company was to place the machine on such support, added to which was the fact that both

companies had actual knowledge of the insufficiency of the support, but there is no allegation of this sort, or that any of the defendants "were acting together," in the present declaration. With actual knowledge on the part of the Ice Machine Company that the work done by the Brewing Company was insufficient, it proceeded with its work. *The whole question before the Appellate Court dealt with that of the negligence of the Brewing Company, and its negligence consisted NOT in erecting the tank upon an insufficient truss but in so doing upon a truss which it at the time KNEW to be insufficient.* To a case in which the Ice Machine Company did not know of the insufficiency of the truss, or in which there was no showing that the one company was to prepare the support for the other, this decision is not a pertinent authority for sustaining liability, certainly in a joint action; and upon the declaration in the case at bar we must assume that no one of the defendants had knowledge of the alleged negligence of any of the co-defendants, and also that there was no arrangement by which any of the defendants was to prepare anything for any of his co-defendants. *Mearns vs. Harris*, 45 App. D. C. 536, 539, *supra*, p. 11.

That the foregoing analysis of the Keifer case is correct, is demonstrated by later decision of the same Court.

Thus, in *Economy Light & Power Co. vs. Hiller*, 203 Ill. 518, 520, the Court said:

"The rule is, that all persons who *join* in the commission of a wrong are jointly and severally liable, and the injured party may sue all or any of them. The joint liability in such a case is not of the same nature as a joint liability for the

breach of a contract, but where two or more are sued, the wrong complained of must be joint in its character. One is never liable for the wrong of another, and if their acts are entirely distinct and separate there cannot be joint liability. (Citations.)”

And in Willard vs. Red Bank Oil Co., 151 Ill. App. 433, the Court said the Keifer case “came within the rule of concurrent negligence of two persons.”

The remaining case cited by the learned trial justice in support of his opinion, McBride vs. Scott, 125 Mich. 517, is if anything even more inapposite than the Keifer case. The building there the subject of litigation fell in the course of erection, injuring and killing workmen engaged upon it. The suit was against the owner of the property, the architect and the various contractors, and on the distinct and express ground that the building proposed to be erected was *obviously* defective and dangerous, the Court, though recognizing and approving the rule that “several tortfeasors, not acting in concert, or by unity of design, are not liable to a joint action for damages, although the consequences of the several torts have united to produce an injury to the plaintiff,” over-ruled the demurrer, of course, because of the “obviously defective and dangerous” character of the building, which was expressly pleaded. Had the declaration here, as there, pleaded that the Knickerbocker Theater building was obviously defective and dangerous we would have a similar case to that in Michigan and a very different one from that actually presented, in which no such allegation is made.

APPELLANT'S AUTHORITIES ON MOTION TO STRIKE OUT

Concurrent negligence is that of two or more persons actually so concurring in the result as that, but for the negligence of both or all the occurrence would not have happened. The case of a collision between street cars is a notable and common example. However negligent the operators of each car might be, the injury would not have been suffered as the result of that of either one alone. This principle is uniformly maintained.

Thus, the Supreme Court of the United States, in *Washington & Georgetown R. Co. vs. Hickey*, 166 U. S. 521, 525, said:

“The so-called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence on the part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction.”

In *Cole vs. Lippitt, et al.*, 22 R. I. 31, the Court said:

“The plaintiff brings this action against the owner, builders, and supervising architect of a house for negligence in its construction, whereby the decedent lost his life. The declaration has two counts, and the defendants severally demur upon the ground that they are improperly joined as defendants in the same action, because the declaration sets out several and distinct, and not joint, breaches of duty and causes of action. * * *

“The second count sets out the contractual relations existing between the defendants, the different parts which each of them took in the work of construction, the consequent duty to the work-

man, the breach thereof by the several parties defendant, and the resulting death of Pierce. Without reciting the long count, it shows that Lippitt was the owner of the estate, who made a contract with Maguire and Penniman for a part of the construction of the house, and employed Robertson to supervise the work, and that Pierce was employed by Maguire and Penniman; that in the course of the work a part of a tower fell upon Pierce and killed him.

“The negligence charged against Lippitt is that he caused the erection of the house upon improper plans, which provided for a tower with an overhanging battlement without proper support, and also provided for bricks and mortar of a kind too hard to form a strong bond, etc.

“The negligence charged against Robertson is that he caused the erection of the house under improper plans, and the negligence charged against Maguire and Penniman is that they did not use reasonable care in construction, and failed to counterbalance and anchor the walls; also, that they built the battlement in too short time for the mortar to set and harden.

“These several charges of negligence are quite different in kind and relation, but the plaintiff claims that they constitute a joint liability, because the negligence of each defendant combined with others to produce the injury. This, however, is not enough to make a joint tort. As stated in *Bennett vs. Fifield*, 13 R. I. 139, parties cannot be declared against jointly where there is no community of wrong doing, even though the tort of any one might be such that, without it, the neglect of duty charged upon the other would not have followed. A similar statement is made in *Sellick vs. Hall*, 47 Conn. 260, 274, that it is not enough to make torts joint that the acts constituting them stand in juxtaposition in time and place. ‘There must be a oneness of act.’ The fact that the effects

of several wrongful acts are produced at the same time and place cannot affect the question. In *Doremus vs. Root*, 94 Fed. Rep. 760, it was held that although a master and his servant through whose negligence another is injured may each be liable for such injury, their obligations rest upon different grounds, and they cannot be held jointly liable.

“The second count of this declaration before us clearly states ‘three different cases, against three different defendants, for three different causes of action.’ Lippitt is charged with furnishing improper plans; Robertson with improper supervision; and Maguire and Penniman with improper work. These three grounds of liability are quite distinct. There is no common legal relation between them with respect to the plaintiff. Of course it may be said that if there had not been improper supervision or plans or improper work, there would have been no injury; but that does not make the three things a joint act. Evidently Maguire and Penniman had nothing to do with procuring the plans, nor Lippitt with the doing of their work. A resulting liability on the part of the owner, arising from a right of supervision of the work, does not make an act of the builders his act. Both may be liable and yet not jointly liable, because the cause of action against each is different from the other. Between Pierce and the builders there was a contractual relation of master and servant, but none between him and the owner, unless the builders are treated as his agents, and none whatever between Pierce and Robertson. We think, therefore, that the count is clearly bad.”

In *Wiest vs. Electric Traction Company*, 200 Pa. St., 148, plaintiff's husband fell over a girder rail lying in a gutter, and received injuries from which he subsequently died. At the time of the occurrence Hoff-

man & Company were contractors engaged in laying tracks for the traction company. They were both joined, together with the City of Philadelphia, under an allegation that the three of them were jointly liable for the death of the plaintiff's husband, but recovery was had against only one of the defendants, "as the evidence failed to show that the act complained of was joint." Reversing this judgment, on the ground that having sued for a joint tort recovery could not be had upon proof of a several one, the Court said:

"This case is an illustration of a practice which is not to be commended. Joining several parties as defendants without regard to the question of the tort being joint, does, no doubt, relieve the plaintiff of the responsibility of finding out, before beginning his action, who is justly chargeable with the wrong causing the injury, as it leaves that question to be developed at the trial. The plaintiff may profit by the contention which naturally arises among the defendants, in which each seeks to charge the other. But such a course does not tend to an orderly trial, nor the attainment of justice.

"It is hardly asking too much of a plaintiff that, before setting the machinery of the law in motion, he be so sufficiently sure of the facts as to know whether the injury for which he complains was a separate act of one party, or a joint act of two or more.

" 'If, in legal consideration, the act complained of * * * can only be considered the tort of the actual transgressor, or the distinct tort of each, a separate action against the actual wrongdoer only, or against each, must be brought:' - Chitty's Pleading, 97.

"We are aware that it is thought that the effect of a misjoinder may be cured by taking a verdict against one defendant only; and authority is not

lacking to support this view. But this remedy is not adequate. The mischief in unwarrantably joining as defendants parties who are not, in fact, joint wrongdoers, is, in the confusion and disorder resulting at the trial, and the increased difficulty in arriving at a just verdict.

* * * * *

“In a suit for a joint tort there should be no recovery upon proof of one or more separate torts. When a joint tort is charged, a joint tort must be proved. In order to sustain the action the allegation and the proof must agree in cases of tort, as in other cases.”

This Court, in *Lisner vs. Hughes*, 49 App. D. C., 40, has held that though, for an assault committed by a servant within the scope of the master's business both master and servant are liable, their liability is several and cannot be made the basis of a joint action.

In *Pomeroy, Remedies and Remedial Rights* (2nd Ed.), p. 265, it is said:

“In order, however, that the general rule thus stated should apply, a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as co-defendants; the injury must in some sense be their joint work. It is not enough that the injured party has, on certain grounds, a cause of action against one, for the physical tort done to him or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort; there must be something more than the mere existence of two separate causes of action for some act or default, to enable him to join the two parties liable in the single action. This principle is of universal application.”

To the same effect are:

Smith vs. Day, 39 Mich. 53;
 Strauhal vs. Asiatic Steamship Co., 48 Ore. 100;
 Henry vs. Henry (Ia.), 186 N. W. 639;
 Johnson vs. Chapman, et al., 43 W. Va. 639;
 Mead vs. Brewing Co., et al. (Colo.), 95 Pac. 284;
 Goodwin vs. Coal Township, et al. (Pa.), 56 Atl.
 65;
 Butler vs. Ashworth, et al., 110 Cal. 614;
 Bowman vs. Humphrey, 124 Ia. 744;
 Tackaberry Co. vs. Sioux City Service Co., et al.
 (Ia.), 132 N. W. 945;
 Sparkman vs. Swift, et al. 81 Ala. 231;
 Geuder, et al. vs. Milwaukee, 147 Wis. 491, 501
 et seq.
 Tuff vs. Warman, 5 C. B. N. S. 585;
 B. & O. Railroad vs. Keen, 65 Md. 394, 401;
 Siegel Copper Co. vs. Troka, 218 Ill. 559, 563;
 Burke vs. Creamery Package Mfg. Co., 126 Ia.
 730, 734;
 Cole vs. German Savings & Loan Society, 124 Fed.
 113, 116 (C. C. A., 8th Cir.);
 King vs. City of Cohoes, 77 N. Y. 83, 90;
 Wood vs. Cumberland Tel. & Tel. Co., 151 Ky.
 77, 79;
 Mesa City vs. Tesueur, et al. (Ariz.), 190 Pac.
 573, 575;
 Fort Wayne & Northern Indiana Traction Co. vs.
 Parish (Ind.), 119 N. E. 488;
 Welch vs. Jackson & Battle Creek Traction Co.,
 154 Mich. 399, 408;
 Besharian vs. Rhode Island Co. et al. (R. I.), 102
 Atl. 807;
 Parsons vs. Winchell et al., 5 Cush. 592;
 Doremus vs. Root et al., 94 Fed. 760;
 Otrich vs. Railroad, 154 Mo. App. 420;
 Hess vs. Buffalo & Niagara Falls R. Co. et al., 29
 Barb. 391;
 Larkins et al. vs. Eckwurz, 42 Ala. 322;

Powell et al. vs. Thompson, 80 Ala. 51;
 Heils vs. Cincinnati Traction Co., 14 Oh. Cir. Ct.
 N. S. 384;
 Bard et al. vs. Yohn, 26 Pa. St. 482;
 Howard vs. Union Traction Co., 195 Pa. St. 391;
 Village vs. Gibbow et al., 81 Oh. St. 263;
 Langhorne vs. Richmond, &c. Ry. Co., 91 Va. 369.

The foregoing are but few of the numerous cases which might be cited in support of the proposition involved, and they deal solely with cases of negligence, for the reason that, in the trial court, it was contended that the rule applied in nuisance cases only, not in those involving negligence as distinguished from nuisance. We have accordingly separated the two classes of cases, and invite the attention of the Court to the following nuisance cases applying the rule that two or more persons who separately commit a nuisance, even though the result of the two or more torts is a single injury, cannot be combined in one declaration.

Symmes vs. Prairie Pebble Phosphate Co. et al.,
 66 Fla. 27;
 Farley vs. Crystal Coal and Coke Co. (W. Va.),
 102 S. E. 265;
 Eckman vs. Lehigh, &c. Coal Co., 50 Pa. Super.
 Ct. 427;
 Key vs. Armour Fertilizer Works (Ga.), 89 S. E.
 593;
 Willard vs. Red Bank Oil Co. et al., 151 Ill. App.
 433;
 Equitable Powder Mfg. Co. vs. Railroad Co. et al.,
 155 Ill. App. 265;
 Verheyen vs. Dewey et al (Ida.), 146 Pac. 1116;
 Howell vs. Bent et al (Colo.), 137 Pac. 49;
 Swain vs. Tenn. Copper Co. et al (Tenn.), 78 S. W.
 93;
 Chipman vs. Palmer, 77 N. Y. 51;

Tackaberry Co. vs. Sioux City Service Co. et al.
 (Ia.), 132 N. W. 945;
 Bowman vs. Humphrey, 124 Ia. 744;
 Brose vs. Twin Falls Land & Water Co. et al.,
 24 Ida. 266;
 McFadden vs. Missouri, &c. R. Co. (Tex.), 92
 S. W. 989;
 Sadler vs. Great Western R. Co. (1896) App. Cas.
 450, before the House of Lords.
 Thomas et al. vs. London County Council (1899),
 1 Q. B. 840;
 Seely et al. vs. Alden, 61 Pa. 302;
 Sun Co. et al. vs. Wyatt, 48 Tex. Civ. App. 349;
 Madison et al. vs. Copper Co. et al., 113 Tenn. 331;
 Southern Salt Co. vs. Robinson (Tex.), 97 S. W.
 107;
 Little Schuylkill Navigation, Railroad & Coal Co.
 vs. Richards' Admr., 57 Pa. 142;
 Miller vs. Highland Ditch Co., 87 Cal. 430;
 Martinowsky vs. City of Hannibal, 35 Mo. App.
 70;
 Polk vs. Illinois Central R. Co., 157 Ky. 762;
 Sellick vs. Hall, 47 Conn. 260;
 Mexican National Construction Co. vs. Meddlegge,
 75 Tex. 634.

A tort does not become joint because its consequences unite with those of several other torts committed by other persons, and this rule applies in cases of negligence and nuisance alike.

Verheyen vs. Dewey et al. (Ida.), 146 Pac. 1116;
 Willard vs. Red Bank Oil Co. et al., 151 Ill. App.
 433;
 Swain vs. Tenn. Copper Co. et al (Tenn.), 78 S.
 W. 93;
 Chipman vs. Palmer, 77 N. Y. 51;
 Bowman vs. Humphrey, 124 Ia. 744;
 Tackaberry Co. vs. Sioux City Service Co. et al.
 (Ia.), 132 N. W. 945;

Symmes vs. Prairie Pebble Phosphate Co. et al.,
 66 Fla. 27;
 Albrecht vs. St. Hedwig's Roman Catholic Ben.
 Soc. et al. (Mich), 171 N. W. 461;
 Boulger vs. North. Pac. Ry. (N. D.), 171 N. W. 632;
 Little Schuylkill Navigation, Railroad & Coal Co.
 vs. Richards' Admr., 57 Pa. 142;
 Miller vs. Highland Ditch Co., 87 Cal. 430.

V

This point is, that no facts are stated constituting a cause of action against the appellant, or showing negligence on his part or for which he is responsible.

The point has already been considered to some extent, in the analysis and discussion of the declaration at pp. 8, 13.

Furthermore, as the declaration does not show, affirmatively, that the appellant was in control of the building at the time of the occurrence complained of, but does show that it had been completed and was in operation by others, he cannot be held liable for the occurrence. Consequently, as the declaration states no facts from which the Court can say whether or not the appellant was negligent, it is not good as against a demurrer thereto.

The declaration does show affirmatively that the building had been completed and that it was then in use. It shows that the appellant was a contractor engaged for the purpose of causing the building to be erected, and that he did cause it to be erected. But it does not show that he erected it or had anything to do with its actual erection, or that he had any control whatever over the building at the time of the disaster, or at any other time. On the contrary, it clearly and distinctly shows that, at that time, it was in the con-

trol of Crandall and the Knickerbocker Theatre Company. No liability can be attached to him unless he was in control of the building at that time.

It thus appears that an essential ingredient of the plaintiff's case is, the fact that the appellant was in control of the building. This being so, according to all of the decisions it is essential that that fact must be pleaded in order to state a good cause of action.

“A declaration in an action for negligence ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others.” *Gautret vs. Edgerton*, L. R., 2 C. P., 371, Wills, J.

“The office of a declaration is, to state the essential facts on which the liability of the defendant in the action depends.” *Alabama vs. Burr*, 115 U. S., 413.

“It is a familiar rule in pleading that where any fact is necessary to be proved on the trial, in order to sustain the plaintiff's right of recovery the declaration must contain a substantial averment of such fact in order to let in proof of it.” *Freidlander vs. Rapley*, 38 App. D. C. 208, 213.

See, also:

Hines vs. Georgetown Gas Co., 3 App. D. C. 369, 375;

District of Columbia vs. Petty, 37 App. D. C. 156 (affirmed 229 U. S. 593);

Miller vs. Ambrose, 35 App. D. C. 75, 81;

Clarke vs. Chesapeake & Potomac Tele. Co., 42 App. D. C. 444;

Dickson vs. Western Union Telegraph Co., 68 Fed. Rep. 630;

Parrott vs. New Orleans & N. E. R. Co., 62 Fed. Rep. 562.

Our major proposition in this connection is that the appellant could not be liable for anything that happened to the building when it was not in his control. We do not imagine that the plaintiff will seriously contest this proposition, but he will probably invoke the two exceptions to it and endeavor to point an application of them to the present case. Those exceptions are:

(a) Cases in which the contractor has knowingly erected the building in a dangerous or defective condition, which cases of course rest on fraud, and in which cases of course the declaration must specifically state the facts to bring it within this exception, and

(b) Cases in which the instrument erected or sold as the case may be is inherently dangerous in and of itself—rather than because of negligence in its construction. Such are poisons, deleterious foods, explosives, and the like, and in such cases the facts must of course be pleaded which bring them within the exception.

Sufficient will appear with respect to the first of these exceptions in the discussion which follows, and with respect to the second of them it should hardly be necessary to remark, even, that a theatre building is not in and of itself inherently dangerous, and therefore the present case cannot possibly come within that exception. As to this remark, if any authority is considered even desirable, it should suffice to invite the attention of the Court to the holding to that effect in the first of the cases to be considered in the discussion

of this major proposition, namely, *Savings Bank vs. Ward*, 100 U. S., 195, in which case, at page 204, the Court said:

“Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *The Mayor, etc., of Albany vs. Cunliff*, 2 N. Y. 165, 174.

“Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builder’s negligence, and such negligence is not an act imminently dangerous to human life. *Loop vs. Litchfield*, 42 N. Y., 351-358.”

Savings Bank vs. Ward, 100 U. S. 195, was a case in which the defendant, Ward, an attorney at law, held himself out to the public as a person skilled in the examination of titles to real estate situated in the District of Columbia. A prospective borrower retained him to examine and certify as to the title to certain parcels of real estate. He made the examination and gave his certificate showing the title to be good whereas in fact it was not. The Savings Bank loaned money on the faith of this certificate, but it had never employed Ward and had had no connection with him. Being unable to realize the money loaned out of the property, because of its defective title, the Bank sued Ward, of course not on the contract of employment, but for negligence in issuing an incorrect certificate. The Court held that it could not recover because Ward’s only liability, whether on the contract or for negligence, was to the person with whom he had his

contract of employment, just as here Wagner's only liability, if any, is to the one by whom he was engaged.

The facts of the Ward case are of course quite different from those in the case at bar, but the principle upon which the decision was based seems to be applicable, and the Supreme Court expressly made it so in its discussion of the subject. That Court, after reviewing authorities to the general effect that an attorney is never liable to anyone but his own client, even for giving incorrect advice directly to a person, the relation of attorney and client not existing between them, "unless it could be shown that at the time he made it he knew it to be false," (page 201), proceeded by analogy to apply to that case other decisions directly controlling this one, saying:

"Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect. *Kahl vs. Love*, 37 N. J. L. 5, 8.

"Injury was received by the driver of a mail-coach which broke down from defects in its construction. He brought suit against the constructor

of the coach who sold the same to the owner of the line in whose employment the plaintiff was engaged when the accident happened. Held, by the whole court, that the action would not lie, as there is no privity of contract between the parties. Unless we confine the operation of such contracts as this to the parties who entered into them, said Lord Abinger, the most absurd consequences, to which no limit can be seen, will ensue; and Baron Alderson remarked, if we hold that the plaintiff can sue in such a case, there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. *Winterbottom vs. Wright*, 10 Me. & W. 109, 115."

* * * * *

"Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labelled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises not out of any contract or direct privity between the wrong-doer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 2 Seld, 397, 410.

"Such an act of negligence being imminently dangerous to the lives of others, the wrong-doer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in gen-

eral liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Collis vs. Selden*, Law Rep., 3 C. P. 496.

“Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *The Mayor, etc., of Albany vs. Cunliff*, 2 N. Y. 165, 174.

“Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builder’s negligence, and such negligence is not an act imminently dangerous to human life. *Loop vs. Litchfield*, 42 id. 351-358.

“So where the manufacturer of a steam-boiler sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials, or for want of care and skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. *Losee vs. Clute*, 51 id. 494-496.”

The foregoing case of *Savings Bank vs. Ward* is cited and expressly applied and followed in *German Alliance Insurance Co. vs. Home Water Supply Co.*, 226 U. S. 220, where the Water Supply Company was under contract with a city to supply water, the city directed it to lay additional hydrants which it failed to do, as the result of which many houses were burned down, the fire insurance company paid the loss, and it

sued the Water Company by way of subrogation to recover the damages sustained, relying not only upon the failure to put in the additional hydrant supply but also other breaches in the contract with the city in that the pipes laid were smaller than provided for, that the Company had neglected to install an electric cut-off, and had failed "absolutely to furnish water with which to extinguish such fire and prevent its spreading to other houses." The Court held that there could be no recovery, whether the suit be "regarded as *ex contractu* or *ex delicto*," saying:

"It appears that the majority of American courts hold that the taxpayer has no direct interest in such agreements, and, therefore, cannot sue *ex contractu*. Neither can he sue in tort, because, in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action *ex delicto*. * * * He is interested in the faithful performance of contracts of service by policemen, firemen, and mail-contractors, as well as in holding to their warranties the vendors of fire engines. All of these employes, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue—though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. (Citations.) Each of these promisors of the city, like the Water Company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would

subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and, in the nature of things, could not have been, in contemplation of the parties.”

In *Galbraith vs. Illinois Steel Co.*, 133 Fed. 485 (C. C. A. 7th Cir.) (certiorari denied, 201 U. S., 643), plaintiff, the owner of a building, contracted with a Sprinkler Company to install a sprinkler therein according to certain plans and specifications which provided for a tank on the top of the house having a triangular steel support. The Sprinkler Company contracted with the defendant for the construction of the triangular support, and defendant in constructing the same omitted a “tie member” specified in the plans. After the tank had been placed in position and filled with eighty-five tons of water, the support collapsed during a high wind owing to the absence of the tie member. Plaintiff paid out large sums in repairing the damage thus occasioned. It was held that, because of the absence of privity of contract, the plaintiff had no action against the defendant. It was also held that the triangular support was not an inherently dangerous object within the rule, the Court saying:

“Plaintiff cannot recover from defendant simply by showing defendant’s breach of its contract with the Sprinkler Company. There was no contract relation between the parties to this case. * * * To the rule there are exceptions. One must not, knowingly or unknowingly, fail to exercise care in the preparation or sale of an article intended to affect human life. One must not knowingly send out an instrument which is imminently and immediately dangerous, without notice of its nature and qualities. From the steel support, as defendant left it, no danger threatened.”

“The general rule of law, subject to certain exceptions not now material to note, is that, after the contractor has turned over the work and it has been accepted by the owner, the contractor incurs no further liability to third persons by reason of the condition of the work, but the responsibility for maintaining it and protecting other persons against danger therefrom, or the use of it in a defective condition, or failing to give notice or warning of dangers to be apprehended from its existence, is then shifted to the owner. This rule of law does not seem to be disputed; in fact, counsel for both parties cite and rely in part on the same cases. (Citations.)” *William vs. Edward Giller Dock Bridge & Construction Co.*, 258 Fed. 591, 594. (C. C. A., 6th Cir.)

“The first count of the original declaration fails to state any duty of the Crane Elevator Co to appellee, or any fact from which it can be said that the Elevator Company owed any duty to appellee; nor does it state any negligence on the part of the Elevator Company. It fails to state that the Elevator Company used or operated the elevator. It therefore does not state a cause of action against the Crane Elevator Company.” *Field vs. French*, 80 Ill. App. 78, 88.

“The declaration contains no averment that the defendant retained control of the part of the premises, or any part thereof over which plaintiff was walking at the time of the accident,” and for this reason a demurrer to the declaration was sustained. *Johnson vs. Perkins*, 167 Ill. App. 611, 617.

In *Hollenbeck Admn. vs. County of Winnebago, et al.*, 95 Ill., 148, 157, an action for death by wrongful act, due to the collapse of a building in the course of construction, the case arose on demurrer, which was sustained, the Court saying:

"In the first count of the declaration it is averred that the County and the individual defendants had the supervision and control of the building which was being erected for a court house, but the count is manifestly bad as to the individual defendants, for the reason it fails to aver that they were owners of or had the exclusive control. It does not appear from the averments of this count, as it should, that the individual defendants had any power whatever over the plan of the building or the character of the material to be furnished. Suppose these defendants were acting jointly with the County. It by no means follows that the County Board had parted with its power or delegated its authority to them. For aught that appears each averment of the count may be true, and at the same time the individual defendants may have been powerless to change a single plan or give any directions in regard to the character or quality of the material of which the building was being constructed. So far as appears from this count, they had no more authority than the decedent, who was employed as a laborer on the building, and, under such circumstances, to hold them individually liable for matters over which they had no control, would be a violation of the fundamental principles of the law."

"If the injuries complained of had been occasioned after the completion of the dam by the contractors, and its acceptance by Laird and Chambers, there can be no doubt of the liability of the latter. Parties for whom work contracted for is undertaken, must see to it before acceptance that the work, as to strength and durability, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume

to the world the responsibility of its sufficiency, and to third parties the liability of the contractors has ceased and their own commenced." *Boswell, et al. vs. Laird et al.*, 8 Cal. 469; *Fanjoy vs. Seales*, 29 Cal. 243.

Upon the ground that the criterion of liability is to be found in the determination who is in control of the thing at the time, it has been held that the owner of an elevator which he had placed under the control of his contractors for use by them, was not liable for an injury occurring while they exercised such control. *Barrett vs. The Singer Mfg. Co.*, 1 *Sweeney* (N. Y.) 545.

In *Mayor, etc., vs. Cunliff*, 2 N. Y. 165, 180, approved by the Supreme Court of the United States in *Savings Bank vs. Ward*, 100 U. S. 195, *supra*, p. 37, the Court said:

"The Court below based the alleged responsibility of the defendants in this suit on the general ground that where one party sustains an injury by the misfeasance of another the sufferer may maintain an action against the wrongdoer for redress. That rule operates where the injury is effected directly by the wrong or where it results from the mal-construction of some object while it is in the possession or under the control, or in any manner used under the agency or instructions of the party originally in fault. But I know of no case where it has been held that a stranger can recover for damages sustained by reason of the defective construction of the object by a builder, after the title to the object has changed, and it has passed out of his possession, and is no longer subject to his control, and in no way used pursuant to any authority or direction from him. A man builds a carriage carelessly with defective

materials, he sells and parts with it, and the purchaser lends it to a friend. The carriage, by reason of the original defect, breaks down, and the friend is injured: Can he recover his damage against the maker? A carpenter is hired to build a barn and furnish the materials. He carelessly places a timber slightly defective under the mow, and the barn is accepted by the owner. Some years afterwards the timber owing to its original defect, breaks and falls upon a laborer, who sustains serious injury: Can he recover of the carpenter? Or, to take a case more nearly parallel with the one under consideration. A Turnpike Company contracts with someone to build a bridge over a creek which their road crosses. The builder erects a defective bridge, and it is accepted and used by the company. Sometime afterwards, the bridge, while one is traveling over it, gives way by reason of the original defect, and the traveler is injured: Can he sustain an action against the builder? I know of no decision which would authorize a recovery under such circumstances. The reason why an action cannot be maintained in such case is that there is no connection between the wrong done and the person whom it is sought to charge for the consequences. The wrondoer has not at the time any control over the subject-matter, or any power or right to remedy the evil. The damage in such case arises in fact from the continued use of the defective subject, and with that the builder who has parted with the title, possession and control of it, has not, and cannot have anything to do. The entire agency is at the time in the existing proprietors by whom or through whose means the wrong is perpetuated. * * *

In the case which I am now considering the defendants had nothing to do with the continuance of the defective bridge, and cannot in my opinion be made responsible for any damage consequent upon any such continuance. I am far from doing

anything to extend the protection of the law to those who are guilty of negligence in the performance of their engagements or duties. We shall repress that effectually, and, what is of great consequence, appropriately, by holding the offending parties rigidly responsible in cases where they have control of the subject-matter, or the persons with whom they deal. To go further would be to stretch the rule of law to meet the hardship of individual cases, which I am never disposed to do, however strongly my sympathies may be enlisted for the sufferers."

In *Losee vs. Clute, et al.*, 51 N. Y. 494, which is also approved by the Supreme Court of the United States in *Savings Bank vs. Ward*, *supra*, p. 37, plaintiff brought the action to recover for damage done to his property by the explosion of a boiler owned and used by the Saratoga Paper Co. The Clutes were made defendants on the ground that they were the manufacturers of the boiler and made the same in a negligent and defective manner. The trial court dismissed as to defendants, Clute, and the Court, affirming this action, said:

"They contracted with the company, and did what was done by them for it and to its satisfaction, and when the boiler was accepted they ceased to have any further control over it or its management, and all responsibility for what was subsequently done with it devolved upon the company and those having charge of it, and the case falls within the principle decided by the Court of Appeals in *Mayor of Albany vs. Cunliff* (2 Comst. 165), which is, that the mere architect or builder of a work is answerable only to his employer for any want of care or skill thereof, and he is not liable for accidents or injuries which may occur

after the execution of the work; and the opinions published in that case clearly show that there is no ground of liability by the defendants to the plaintiff in this action. They owed *him* no *duty* whatever at the time of the explosion either growing out of contract or imposed by law."

In *Curtin vs. Somerset*, 140 Pa. 70, 78, 80, an action to recover damages for personal injuries resulting from the alleged negligence of defendant, the plaintiff, a guest at a hotel, was sitting upon one of the porches of the building, when one of the girders supporting the porch broke, causing the floor to fall, and plaintiff was injured. The suit was against the contractor, and the Court said:

" 'The true rule, which we think applicable to it, may be found in *Wharton on Negligence*, 2nd Ed., Sec. 438. It is as follows:

" 'There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. * * * Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and, after he has finished his work and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence in the contractor, nor did the contractor ac-

cept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city that it would have its bridge and highways in good order, but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection.' "

After an extended review of the authorities, the Court continued:

"We will not pursue the subject further. We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason. The consequence of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine or his steamship shall contain no hidden defects, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations under such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned."

In *Fitzmaurice vs. Fabriane*, 147 Pa. 199, the plaintiff, a minor, was injured by a board falling on her as she was leaving a water-closet. It was alleged that defendant had contracted to clean the privy, that in so doing the boards on the roof were removed and when the work was completed, the boards were thrown loosely back on the roof. The accident happened thirteen months after the work had been completed. The Court, holding that there was no action, said:

"It needs but a statement of the case to show that this claim cannot be sustained. Whether the

defendant properly performed his contract or not, his work had been accepted by his employer, and the defendant owed no duty to any one who should afterwards use the well."

In *First Presbyterian Congregation vs. Smith and Minnahan*, 163 Pa., 561, defendants contracted with the City of Easton to construct a sewer according to plans and specifications. After the work had been completed and accepted by the City, the street in front of plaintiff's property caved in and serious damage was done to the property. It was alleged that the cave-in was due to defective construction. The Court held that plaintiffs had no cause of action against the defendant, as the work had been completed and accepted by the city.

In *Smith vs. Pennsylvania Railroad Co.*, 201 Pa. St., 131, where a railroad company contracted with a municipality to construct and maintain a bridge for it, actually constructed the bridge and turned the same over to the municipality, after which an accident occurred by reason of defect therein, the Court, holding the railroad company not liable, said:

"Doubtless it was interested to avoid grade crossings, and as an inducement to the borough to vacate the streets, it offered to erect and maintain the bridge. In doing so it incurred no obligation except its contract obligation, to the borough. This obligation was fully discharged as to the construction by the acceptance of the bridge by the borough council."

In *Styles v. Long Co.*, 67 N. J. L., 413, holding a contractor for the erection of a bridge not responsible to a third person for an injury sustained by reason of the

defects in the work or negligent construction, the Court, by Pitney, J., said:

“The general rule is entirely well settled that one who is not a party to a contract cannot sue in respect of a duty arising out of the contract. * * * Therefore, the plaintiff in the present action, as one of the public for whose general benefit and protection the contract in question was made, does not sustain such a relation to the defendant as a contracting party that she can maintain her action of tort by reason of a mere violation of the contractual duty.”

In the same case, on appeal, affirming the decision, the Court said:

“In a case where the duty to the plaintiff rests, in the first instance, upon someone not the defendant, and the plaintiff is injured by failure to perform that duty, the proximate cause of the injury is the failure of the one who is under a duty immediately to the plaintiff. The failure of one whose duty is primarily to a third person, but not to the plaintiff, may, indeed, be a cause of the injury, but it is a remote, not a proximate cause. The principle, as stated by Mr. Beven, is in effect the same, though couched in somewhat different language. *Beven, Negl.*, 61, where the English cases are stated and considered. The plaintiff in the present case relies upon the invitation to use the bridge. That there was such an invitation to the public cannot be questioned, but it was the invitation of the county authorities, upon whom rested the duty to provide the bridge, who alone had authority to maintain such a structure.” 70 N. J. L. 301.

Holding that a contractor is not liable to a third party for defective construction of a bridge, it has been said:

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Holding that a contractor is not liable to a third party for defective construction of a bridge, it has been said:

“This right to sue in tort extends no further than to the employer, and in some cases, to those who succeed to his legal rights. * * * No authority has been cited, and we know of none, which authorizes A to maintain an action against B, for an alleged injury suffered from the latter’s failure to complete the contract made with C.” *Williams v. Stillwell*, 88 Ala. 332.

In *Travis v. Rochester Bridge Co.*, 122 N. E. 1 (Ind.), holding that a bridge comes within the general rule and not within any of its exceptions, the Court said:

“The bridge did not give way and fall until about five years after it was constructed, during which time it was used by the public. The fact, as appears from the complaint, that it was thrown open to the public and used for such length of time shows an acceptance by the county. The complaint does not allege that any fraud or deception was practiced by the contractors in procuring an acceptance of the bridge by the county, or that the defect was intentionally concealed so as to prevent its discovery by a proper inspection. Under such a state of facts, the liability of the contractor to the general public and persons not parties to the contract terminated at the time the bridge was accepted as completed and thrown open to the use of the public. Such act on the part of the county amounted to an intervention of an independent human agency which had the effect of breaking the chain of causation between any negligence of the contractor and an injury which might occur after acceptance. After acceptance of the bridge by the county, the traveler might rightly repose confidence in the county to the extent of believing that it had exercised a reasonable care to provide a safe bridge for his use; but he had no right to repose such confidence in the contractor who built the bridge. *Daugherty v. Herzog*, 145 Ind., 255.

“The rule thus announced applies to all cases where an independent contractor constructs a building, bridge, or other structure under contract with an individual or corporation, in the absence of a showing that such fraud, deceit, or intentional concealment of defects was practiced by the contractor in obtaining the acceptance as to render such acceptance ineffectual. (Citations.) * * *

“In the class of cases to which the one at bar belongs, the work is generally done by the contractor in accordance with plans furnished by the party letting the contract or under his direction and supervision, and the work is subject to inspection before acceptance. In the other class of cases to which reference is made, the machinery or other article manufactured is made according to the plans of the manufacturer and under his direction and subject to his inspection before sale. The differences pointed out between the classes of cases under consideration furnishes a reason for holding that the liability of an independent contractor toward third persons, not parties to the contract, terminates with the completion of the work and the acceptance of the contract, while a similar rule, but somewhat modified, applies to manufacturers selling in the ordinary course of trade. As affecting the liability of a contractor, the acceptance of the work by the other party to the contract operates as the intervention of an independent human agency which breaks the chain of causation so as to preclude a third party from asserting or relying on any duty on the part of the contractor to use care for his safety in the construction of the work.”

This rule has likewise been applied to the case of bridges in *Huset v. Case Threshing Machine Co.*, 120 Fed. 665 (C. C. A. 8th Cir.), *Galliotte v. King Bridge Co.*, 122 Fed. 378 (C. C. A. 6th Cir.), *certiorari* denied 191 U. S. 569.

In *Lidecker et al. v. Board of Chosen Freeholders et al.*, 91 N. J. L. 622, 624, plaintiff was thrown from his bicycle while riding over a public road, as the result of improper oiling of the road, and both municipality and the contractor were made defendants. *Held*, that the contractor was not liable.

In *Field et al. v. French*, 80 Ill. App. 78, 88, the Court said:

“The second count fails to state facts which in law show any negligence of the Elevator Co. of which the appellee can avail himself. It alleges that when the injury occurred, the appellants other than the Elevator Co. were using and operating the elevator, and the only negligence charged against the Elevator Co. in this count is the ‘negligence with which the elevator was built and constructed.’ This cannot avail appellee as against the Elevator Co. There is no fact alleged showing privity between the appellee and the Elevator Co., without which there can be no liability of the Elevator Co. in this case to appellee for alleged negligent construction of the elevator. The duty of the Elevator Co. was to Field, not to the appellee, so far as concerned negligent construction.” (Citations.)

In *Wood et al. v. Sloan*, 20 N. M. 1271, a case of a defective floor board in a room in an office building, which gave way and caused injuries to the plaintiff, holding the general rule applicable, the Court recognized but two exceptions: (1) Imminently dangerous instrumentalities, (2) Where the thing itself is not imminently dangerous but is rendered so by defect, and the builder or manufacturer has knowledge thereof. The opinion contains an exhaustive review of the authorities, and is most luminous and instructive.

In *Mayor, etc., v. Holmes et al.*, 63 So. 454 (Miss.), a city, in changing the grade of certain streets, undertook to raise a church building to the new grade and employed a contractor for the purpose. After the work had been completed, and while a funeral was in progress in the church, the floor fell in, and for damages then sustained the suit was brought. Applying the general rule, the Court said:

“The general rule is that, after the contractor has turned the work over, and it has been accepted by the proprietor, the contractor incurs no further liability to third parties by reason of the condition of the work; but the responsibility, if any, for maintaining or using it in its defective condition, is shifted to the proprietor. (Citations.) Before the city can be held liable to complainant it must be shown that there was some element of deceit, or of concealment of the dangerous instrumentality. It is not sufficient to allege negligent construction. It must also be alleged that there was concealment of its dangerous condition when the building was turned over to its owners and accepted by them.”

The English cases are to the same effect.

Thus, in *Collins v. Selden*, L. R. 3 C. P. 495, which is approved in *Savings Bank v. Ward*, 100 U. S. 195, *supra*, p. 37, a declaration was held bad on demurrer as showing no duty owing by the defendant to the plaintiff, which charged negligence in improperly hanging a chandelier in a public house, *Wills, J.*, saying:

“There would be no end to actions if we were to hold that a person having once done a piece of work carelessly should, independently of honesty

of purpose, be fixed with liability in this way by reason of bad materials or insufficient fastening. Take the case of a man building a house. His work people scamp the work; five or six years afterwards a chimney stack falls down through a high wind, and injures a person with whom he has no contract, to whom he owes no duty, and as against whom he cannot have been guilty of any fraud. To hold him liable to an action at the suit of the injured person would be going far beyond anything which has been decided and is in our law."

The general principle was applied to a mail coach in *Winterbottom v. Wright*, 10 M. & W. 109, which is also approved in *Savings Bank v. Ward*, 100 U. S. 195, *supra*, p. 37. It is a leading case.

In the *Caledonian Railway Co. v. Mulholland* (1898), L. R. A. C. 216, the Caledonian Railway Co. delivered its wagons filled with coal to the Glasgow & South-western Railway Co. to be hauled to certain gas works. While *en route* the brakes of one of the wagons failed to work and the driver was killed as a consequence. It was held that, as the Caledonian Railway Co. was not in charge of the wagon at the time, there was no duty owing by it to the driver of any of the wagons.

In *Longmeid et ux. v. Holliday*, 6 Exch. 761, which is approved in *Savings Bank v. Ward*, 100 U. S. 195, *supra*, p. 37, a husband purchased a lamp which was so defectively constructed that when his wife attempted to use it, it exploded and injured her, and it was held that the wife had no cause of action, there being no proof that the defendant knew of the defect.

See, also, to like effect:

Hart v. Washington Track Club, 157 Ill. 9, 16;
O'Donnell v. Kavanaugh et al., 158 Ill. 599, 602;

Covert v. Cranford et al., 141 N. Y. 521, 527;
 Cross v. Koster, 17 App. Div. 402;
 Fitzmaurice v. Fabriane, 147 Pa. 199;
 First Presbyterian Congregation v. Smith et al.,
 163 Pa. 561;
 Oliver v. Pettacsonsett Const. Co., 36 R. I. 437,
 484;
 Gorham et al. v. Gross et al., 125 Mass. 232;
 Thomas v. Laws, 221 Mass. 447;
 Daugherty v. Herzog, 145 Ind. 255, 260-1;
 Carter et ux. v. Harden, 78 Me. 528;
 Bailey v. Northwestern Ohio Gas Co., 4 Ohio Cir.
 471, 483;
 Burdick v. Cheadle et al., 26 Ohio St. 393;
 Earl v. Lubbock (1905), 1 K. B. 253.

The principle of the foregoing cases may be briefly stated as follows: No one is responsible to another for damages, whether the suit be *ex contractu* or *ex delicto*, except to those who are in privity with him. Out of a contract, however, may grow certain legal relations and consequent legal obligations, rights and liabilities created by law, but as a general proposition no such obligation can be created with respect to any building or article against one who is not in control thereof.

The exceptions to the rule which will be more fully discussed hereinafter, are: (1) cases of articles of inherently dangerous character the very nature of which imposes upon the manufacturer the duty to exercise care commensurate with the danger to be guarded against, in order to be in the position of having exercised reasonable care under the circumstances, and, (2) cases of articles not inherently dangerous but which are made so by reason of the character of the

very defect complained of, which imposes no liability upon the manufacturer however except in cases in which he has actual knowledge of the existence of such defect and conceals the same. This exception requires no consideration in the present case.

The rule itself finds expression in numerous doctrines and classes of cases. Thus, the doctrine and rule that a landlord is not responsible to his tenant or to third parties during the existence of a tenancy for damages resulting from a defective condition of the premises even though such defect be due to negligence, is based upon the main rule now under consideration, namely, that at the time of the occurrence the landlord has parted with the possession and control of the premises, and they are for the time being the exclusive property of the tenant, who is alone responsible. *Doyle v. Union Pacific Railroad Co.*, 147 U. S. 413, 425; *Howell v. Schneider*, 24 App. D. C. 532, 547; *Keroes v. Richards*, 28 App. D. C., 310; *Enquest v. Didden et al.*, 41 App. D. C. 181.

Where a declaration alleged that A had leased his building to B and thereafter C was injured by reason of the dropping of a bucket from the building upon her head, it was held to state no cause of action against A because it shows no control over the building by A at the time of the occurrence. *C. & W. R. Co. v. Gardanier*, 116 Ill. App. 619.

The same rule is announced in *Shindelbeck v. Moon*, 32 Ohio St. 264, 276; and in *Valin v. Jewell et al.*, 88 Conn. 151, 155.

With respect to the exception as to dangerous instrumentalities:

It has been held that crude petroleum cannot "properly be classed as 'a dangerous agency' within the

meaning of the rule," and that therefore the shipper of petroleum in a car not equipped with a valve regulating its outflow is not responsible to a third party for the destruction of a mill occasioned by the leakage and ignition of the petroleum. *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400 (C. C. A., 7th Cir.); *Cleveland, etc., Railway Co. v. Ballantyne*, 84 Fed. 935, 936 (C. C. A., 7th Cir.); *Standard Oil Co. v. Murray*, 119 Fed. 572 (C. C. A., 7th Cir.).

So as to a side saddle, in *Bargdon v. Perkins-Campbell Co.*, 87 Fed 109 (C. C. A., 3rd Cir.), the Court saying:

"The article here in question is not, like a poison drug, which was the harmful agent in *Thomas v. Winchester* (6 N. Y. 397), inherently dangerous, but is, like the lamp in *Longmeid v. Holiday* (6 Exch. 761) not in its nature extra hazardous."

And the *Longmeid* case which is considered, *supra*, p. 56, was approved in *Savings Bank v. Ward*.

A binding valve on an engine which permitted the breaking of a fly wheel is not "immediately or imminently dangerous to human life or safety, so as to make it a breach of duty owing by strangers to supply to a customer who might use it in a business in which third persons would be employed." *Marquardt v. Ball Engine Co.*, 122 Fed. 374, 377 (C. C. A., 6th Cir.).

In *McClaren v. United Shoe Machinery Co.*, 166 Fed. 712 (C. C. A., 1st Cir.), holding that a stitching machine used in the manufacture of shoes not to be such an imminently dangerous article, the Court said:

"The case at bar has no relation to any such exceptions. If there was any question about this

ance wheels, steam boilers, hoisting apparatus, gasoline burners, and freight and passenger elevators, the Court said:

“The case before us does not fall within any of the exceptions laid down to the general rule, which seems to be supported by substantially the entire current of authority.”

In *Berger v. Standard Oil Co.*, 126 Ky. 155, 161, it is held that “lubricating oil is not of that class of articles” termed intrinsically dangerous within the rule.

Applying the same rule to a drop press in use by a manufacturing jeweler, and examining the authorities at some length, it has been said:

“We think that the result of the cases on this subject clearly establishes the weight of authority in favor of the rule that where the cause of the injury is not in its nature imminently dangerous; where it does not depend upon fraud, concealment or implied invitation; and where the plaintiff is not in privity of contract with the defendant, an action for negligence cannot be maintained.” *McCaffrey v. Mossberg and Granville Mfg. Co.*, 23 R. I. 381, 387.

It has been held that a cylinder of a steam threshing machine is not dangerous within the rule (*Herzer v. Kingsland & Douglas Mfg. Co.*, 110 Mo. 605); or a fire work known as a “sparkler” (*Schmidt v. Capital Candy Co.*, 166 N. W. 502 (Minn.)).

An emory wheel which bursts has also been held not to be a such dangerous instrumentality. *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341.

Distinguishing the foregoing case from that of “wal-

nut oil stain," at least 50% of which is composed of volatile and inflammable ingredients which quickly vaporize producing a gas which would instantly ignite on coming in contact with a lighted match, the Court said:

"In that case the defendant was a manufacturer of emory wheels, and the plaintiff while at work was injured by the explosion of a wheel which his employer had bought and installed. It was held that he could not recover in the absence of knowledge on the part of the defendant that the wheel was defective when it left the factory. But an emory wheel which may explode when revolving at high speed is not recognized as intrinsically harmful, and the manufacturer who makes and vends articles of ordinary use, which of themselves are harmless, is ordinarily held not to be answerable if when in use personal injuries are caused by their defective construction." (Citations.) *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 597.

Lime is not dangerous within the rule. (*Kusick v. Thorndike & Hix, Inc.*, 224 Mass. 413;) nor is a carboy of spring water (*Burnham v. Lincoln*, 225 Mass. 408); or a bar of soap (*Barrange v. Hinckley Rendering Co.*, 230 Mass. 93); or cement (*Windram Mfg. Co. v. Boston Blacking Co.*, 239 Mass. 123; *Abercrombie v. Union Portland Cement Co.*, 205 Pac. 1118); or a gas flat-iron (*Pitman v. Lynn Gas & Electric Co.*, 135 N. E. 223 Mass.).

A steam boiler containing a weak seam covered with asbestos, is not a dangerous instrumentality. *Laude-man v. Russell & Co.*, 46 Ind. App. 32.

An air gun is not dangerous within the rule. *Chaddock v. Plummer*, 88 Mich., 225.

In *O'Neill vs. James*, 138 Mich., 567, 574, holding a bottle of champagne cider which in fact exploded not to be dangerous within the rule, the Court, after examining the authorities at considerable length, said:

“It will be observed that, where no contractual relations exist, the doctrine is recognized that there must be knowledge of the dangerous character of the thing sold, before defendant can be held liable, and this doctrine is recognized in all the cases to which our attention has been called.”

That a steam heating plant is not a dangerous instrumentality is held in *Pittsfield Cotton Wear Manufacturing Co. v. Pittsfield Shoe Co.*, 71 N. H., 522, where the exceptions to the general rule are thus stated, at page 532:

“The weight of authority is against any such liability except ‘where the thing causing the injury is of a noxious or dangerous kind,’ or where the defendant has been found guilty of fraud or deceit in passing off the thing.” (Citations.)

A carriage has been held not to be dangerous within the rule in *Burkett v. Studebaker Mfg. Co.*, 126 Tenn., 467, which follows the general rule, and recognizes the two exceptions last above stated.

A bug in a plug of tobacco has been likewise so ruled. *Liggett & Myers Tobacco Co. v. Cannon*, 132 Tenn., 419.

In *Larrabee v. De Moines Tent & Awning Co.*, 178 N. W., 373 (Ia.), holding that a structure consisting of circus seats is not imminently dangerous, the Court said:

“It is broadly true that, where the charge of negligence is based upon a breach of duty arising out of contractual relations, no cause of action arises in favor of one not in privity to such contract. To this general rule there are exceptions. Such exceptions arise when one by sale or otherwise puts into circulation, so to speak, some noxious or imminently dangerous thing which is likely to cause serious injury to any person into whose hands it may come. These include poisons not labeled, explosives, vicious animals, etc. This exception applies not only to sales of personalty, but may also apply to the construction of structures imminently dangerous to human life while such structure is within the possession and control of the wrongdoer. If the thing sold or constructed be not imminently dangerous to human life, but may become such by reason of some slight defect, then a liability may arise against such vendor or contractor if he knew of the defect and fraudulently concealed it. The liability in such cases is predicated upon deceit.”

Gas has been not a dangerous instrumentality in *Bailey v. Northwestern Ohio Gas Co.*, 4 Ohio Cir. 471, 483.

An elevator is not such a dangerous instrumentality. *Zrewian v. Kieckhefer Elevator Mfg. Co.*, 90 Wis. 497.

In *Kerwin v. Chippewa Shoe Mfg. Co.*, 163 Wis. 428, 432, the Court said:

“It is obvious that a nail used to fasten a shoe sole is not of an inherently dangerous nature. To say otherwise would be a contradiction of the universal experience of mankind in wearing ‘nail soled shoes.’ Can it be said that a nail used to fasten on a shoe sole, in a deceptive or negligent

manner in the construction of the shoe" (so as to make it resemble a sewed instead of a nailed shoe) "rendered the shoe so imminently dangerous to the life, limb and health of the wearer that the defendants ought to have anticipated that it naturally and probably would produce such injury? The facts alleged do not present a case of such an inherent danger in the material used or the manner of manufacturing the shoe. Nor do the facts stated show that the alleged negligent manner of constructing the shoe made it an imminently dangerous article in the light of the nature of the defect and the use and purposes for which it was designed."

In *Miller v. Mead-Morrison Co.*, 165 Wis. 536, 541, it was held that an insufficiently fastened guard rail in a coal handling device built by a contractor for a fuel company, which the jury found was, because of the manner of fastening, imminently dangerous to life and limb when used as it was intended to be used, will not support an action against the contractor by a third party, after the delivery of the device to the owner for whom it was built, in the absence of a showing that the defendant had actual knowledge that it was imminently dangerous.

In *Cadillac Motor Car Co. v. Johnson*, 221 Fed. 801 (C. C. A., 2nd Cir.), the Court holding that an automobile is not an imminently dangerous instrumentality within the rule, said:

"The trial judge proceeded throughout the case on the theory that, though an automobile is not inherently a dangerous thing, it becomes so if fitted with a weak and insufficient wheel, and if the defendant knew, or ought to have discovered, that the right front wheel was such, then, especially

in view of its prospectus (in which it had intimated that it had manufactured its own wheels), it was liable in damages to the plaintiff, although it had no contractual relations with him. We do not understand this to be the law. So far as third parties are concerned, the liability of manufacturers is as follows: One who manufactures articles inherently dangerous, *e. g.*, poisons, dynamite, gun powder, torpedoes, bottles of water under gas pressure, is liable in tort to third parties which they injure unless he prove he has exercised reasonable care with reference to the article manufactured (citations). * * * On the other hand, one who manufactures articles dangerous only if defectively made, or installed, *e. g.*, tables, chairs, pictures or mirrors hanging on the walls, carriages, automobiles, etc., is not liable to third parties for injuries caused by them, except in case of willful injury or fraud." (Citations.)

To the same effect see:

King v. Smythe, 132 Penn. 419;
 Ford Motor Co. v. Livesay, 61 Okla. 231;
 Tyler v. Stephen's Admr., 163 Ky. 770.

In 261 Fed. 878, 886, the same Court, after a reorganization of the personnel of the Court, overruled the foregoing decision for the reasons found in the opinion of the Court of Appeals of New York in MacPherson v. Buick Motor Co., 217 N. Y. 382, post, p. 68, adding:

"We cannot believe that the liability of the manufacturer of automobiles has any analogy to the liability of a manufacturer of 'tables, chairs, pictures or mirrors hung on walls.' The analogy is rather that of a manufacturer of unwholesome

food or of a poisonous drug. It is every bit as dangerous to put upon the market an automobile with rotten spokes as it is to send out to the trade rotten food stuffs."

In *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, upon which the overruling decision in *Johnson v. Cadillac Motor Car Co.*, 261 Fed., 878, just considered, was based, the Court reviewed the authorities at length, but made no mention of the decisions controlling in this jurisdiction, *Savings Bank v. Ward*, 100 U. S., 195, *supra*, p. 37, and *German Alliance Insurance Co. v. Home Water Co.*, 226 U. S. 220, *supra*, p. 40. In the *MacPherson* case, the Court, holding that an automobile is an imminently dangerous instrumentality within the rule, said, at pp. 389 et seq.:

"If the nature of the thing is such that it is reasonably certain to place life or limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of the danger, not merely possible, but probable. It is *possible* to use almost anything in a way that would make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may sometimes be a question for the court and sometimes a question for the jury. And it must also be knowledge that in the usual course of events the danger will be shared by others than

the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturer of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene, the manufacturer of the finished product must fail in *his* duty of inspection. It may be that in those circumstances the negligence of the early parts of the series is too remote to constitute, as to the ultimate user, an actionable wrong. (Citations.) We leave that question open. We shall have to deal with it when it arises."

The question thus left open is the very question here involved, stated in another form, namely: Whether the negligence of the contractor is too remote, the accident occurring after he has turned the building over to the owner, who must have failed in his duty of inspection or else the catastrophe could not have occurred. Upon this question, as we have seen, decisions of binding force in this jurisdiction have been pronounced. But, even were we free to ignore those decisions, the doctrine of the MacPherson case is not applicable to the facts upon this record. It recognizes the general rule as laid down in our own decisions, and limits the exception now under consideration to a state

of facts in which the danger is "such that it is reasonably certain to place life or limb in peril," coupled with "knowledge of the danger, not merely possible, but probable," and with the "added knowledge that the thing will be used by persons other than the purchaser, and used without new tests." Measured by these limitations on the exception (and it is the broadest statement of the exception that has been made anywhere), what is there in this declaration to show that the defect or negligence complained of was reasonably certain to place life or limb in peril or even what was the defect or negligence? Where is the allegation that this appellant had knowledge of such danger and knowledge that it was not merely possible but probable? What is there to show that he had the added knowledge that the building would be, or indeed was, used without new tests, or that it was in fact used without them? Not a thing. Under all of the authorities it was the duty of the owner to make inspections and tests and to satisfy himself as to the sufficiency of the building before accepting it. This appellant therefore had every reason to suppose that the owner had so satisfied himself. Furthermore, it is not every defect in a building that will cause its fall, nor is it every defect therein which though it does actually cause the fall is reasonably certain to do so, nor is knowledge or even duty to know of any defect or danger, charged in this declaration, much less is there "knowledge of the danger, not merely possible, but probable." The declaration must of course show this knowledge. It does not do so. For aught that appears here, the defect or negligence complained of, whatever it was, may have been such as to make it merely possible—rather than probable—that the catastrophe would occur, the

possibility having been in fact realized. For this fatal omission to show facts essential to bring the case within the doctrine of the MacPherson decision, even though it be conceded (which of course would be preposterous), that the case itself can be so brought within that decision, the demurrer must be sustained.

However, there was a vigorous dissent by Bartlett, Chief Justice, who reviews the cases at length and says:

“I think that those rulings, which have been approved by the Appellate Division extend the liability of the vendor of a manufactured article further than any case which has yet received the sanction of this Court. It has heretofore been held in this State that the liability of the vendor of the manufactured article for negligence arising out of the existence of defects therein does not extend to strangers injured in consequence of such defects but is confined to the immediate vendee. The exceptions to this general rule which have thus far been recognized in New York are cases in which the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof; in other words, where the article sold was inherently dangerous. * * *

The late Chief Justice Cooley, of Michigan, one of the most learned and accurate of American law writers, states the general rule thus: ‘The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third persons who have no contractual relations with him for negligence in the construction, manufacture or sale of such article.’ (Citations.) * * *

I do not see how we can uphold the judgment in the present case without overruling what has been so often said by this Court and other Courts of

like authority with reference to the absence of liability for negligence on the part of the original vendor of an ordinary carriage to anyone except his immediate vendee."

In *Field v. Empire City Gas Co.*, 179 App. Div. 253, holding that an ordinary wooden bedstead is not a dangerous instrumentality within the rule, the Court distinguishing from the *MacPherson* case and another prior decision to the same effect, *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, saying:

"Both of these cases involved the negligent construction of automobiles designed and intended to travel through public streets and roads at great speed—in the *MacPherson* case fifty miles an hour—and in the latter case there was in addition a violated duty of inspection. * * * No such facts are involved in the case at bar. * * * The principle of the decision is that the manufacturer had no right to send out a car which was not properly tested, and 'having disregarded this duty to the public in general, including the purchaser, the manufacturer is liable for the injury growing out of such negligence,' a quite different principle from that involved in the case at bar. * * * An ordinary bed is not an article that is reasonably certain to place life and limb in peril when negligently constructed, or which of itself, in the use to which it is intended to be put, gives warning of dangerous consequences, attending its use, and the manufacturer is not charged with knowledge of danger in its contemplated use, 'not merely possible, but probable.' "

So, as to a folding bed. *Lewis v. Terry*, 111 Cal. 39. In *Earl v. Lubbock* (1905), 1 K. B. 253, it was held

that a van is not a dangerous instrumentality within the rule.

In *Bates v. Battey & Co., Limited* (1913), 3 K. B. 351, 355, the facts of which are not pertinent, the Court held that liability does not attach "where a thing not dangerous in itself becomes dangerous through a defect occasioned by breach of contract in its manufacture or delivery," and that in such case liability to a third party could not be predicated on the fact that "although he did not know, he might by the exercise of reasonable care have known its condition."

Approaching the subject from still another point of view, we reach exactly the same conclusion. It is of course elementary that a contractor is not responsible for negligence in drawing the plans but only for his own negligence in executing them, and it is equally fundamental that a pleading must be construed most strongly against the pleader. *Supra*, p. 31. It follows that, even if the declaration charged that the appellant actually erected the building, he is not responsible if he performed the work in accordance with the plans and specifications though they were negligently drawn, at least unless he knew of the defects and dangers, and therefore, as the declaration omits to charge that he did not follow the plans and specifications, or that he had such knowledge, it must be assumed that he did follow them and had no such knowledge, and the demurrer should have been sustained.

No authority has been found to the contrary of either of these propositions. The latter has already been considered, *supra*, p. 31, and the former is laid down in numerous cases and even as between the contractor and the owner, where privity does unquestionably exist, including:

Lidecker v. Board of Chosen Freeholders, 91 N. J. L. 622;
 Willis v. White & Co., 150 N. C. 199.
 District of Columbia v. Clephane, 110 U. S., 212;
 United States v. Spearin, 248 U. S., 132, 136;
 Wells v. Goldenburgh, 65 Fed., 466;
 Hills et al. v. Farmington, 70 Conn., 450;
 Porter v. Wild & Son, 52 Ga., 520;
 Sperry v. Fanning et al., 80 Ill., 371;
 Holland v. Union County, 68 Ia., 56;
 Culbertson v. Ashland Cement & Cons. Co., 144 Ky. 614;
 Herbert v. Weil, 115 La., 425;
 Seymour v. Long Dock Co., 20 N. J. Eq., 386, 411, 412;
 Harlow & Co. v. Homestead, 194 Pa., 57;
 Filbert et al. v. Philadelphia, 181 Pa. 531, 545;
 Adams v. Tri-City Amusement Co. (Va.), 98 S. E., 687;
 Bentley et al. v. State, 73 Wis., 416;
 McKee v. Brandon, 3 Ill., 339.

"As the contractor was doing his work under the directions and specifications of those engineers he cannot be held responsible for their errors or miscalculations," or for those of the owner. *McConnell v. Corona City Water Co.*, 149 Cal., 60, 64; *Birmingham Fire Brick Works v. Allen*, 86 Ala., 185.

In *Gaegling v. Gilmore*, 49 Ill., 248, the building fell while in course of construction. The work was being done in two parts by different parties under separate contracts. In the fall of the building appellee's house was crushed, his wife and child were killed and he was himself injured. Reversing a judgment in his favor, the Court said:

"A builder, working under the plans and direction of an architect, does not hold himself out as a

scientific architect. He only holds himself out as a skillful and competent workman, capable of fully carrying into effect the plans of the architect. He neither directly or indirectly indorses or insures the sufficiency of the architect's plans. He does not devise them, indorse them, or undertake for their sufficiency. He only undertakes that his work shall be skillful and workmanlike. And if he fails in this, he must answer in damages for the loss he has thus produced. If, then, this building fell as the result of negligence, incompetency or want of skill in the manner in which the work was performed by appellant, he would be liable for the damages which ensued. But if he performs his part of the work with skill, and in a workmanlike manner, under the direction of the architect, and on his plan, and that plan was defective, he would not be liable. He, in the performance of his part of the work, must be responsible for the skill and fidelity of the workmen he employses in its execution, as well as of persons under his control, but not for the acts of those under whom he acts, or for others acting independently of him."

In *Clark et al. v. Pope et al.*, 70 Ill., 128, 132, the Court said:

"When it shall be established the building was constructed in a workmanlike manner, under the plans furnished, or if there was any material deviation it was made with the knowledge and consent of the committee, there would be no responsibility resting on the contractors, no matter from what cause it was destroyed, whether from its own inherent weakness in the mode of construction, or from the extraordinary violence of the storm. Their undertaking was simply to do the work with reasonable skill, under the designs furnished by the architects. They were not guarantors as to

the strength of the edifice when finished, or its capacity to withstand the violence of the winds."

"It is not alleged that appellants did not grade the street in all respects as required by the ordinance, and we must therefore assume that they did. What they did having been done under the authority of law, then they are not responsible for injury resulting to the appellees from the consequence of the failure to provide an outlet for the water accumulating in the street, or for the consequences resulting from it. It was not their duty, but the duty of the city, to provide plans for the work, and guard against unnecessary injury to property." *Pearson v. Zabel*, 78 Ky., 170, 174.

"It would be a hard and impracticable rule to announce that a man who had performed his duty under the contract should be held responsible for the sufficiency and correctness not of the work which he performed, but of the plans which are furnished him to be carried into execution. It may readily be conceived that a carpenter or builder may have the mechanical knowledge and skill to erect a building or structure of any kind, when he would in no way be competent to determine its safety or whether it would meet the requirements of its construction. Frequently such questions would have to be determined by skillful and learned engineers. In the case of building bridges, the resisting or sustaining power of material would have to be scientifically determined; and it would be a strange law indeed that, under such circumstances, the mechanic would be held responsible for a mistake in a calculation of this kind. The result would be either that contractors would refuse to erect structures, or that, in order to make themselves safe, they would charge such prices as would be prohibitive. * * * The term 'law of the building,' is a happy and forceful

expression, and is particularly pertinent to the facts of this case. No higher duty, it seems to us, can be demanded of the ordinary contractor in building structures of this kind, than to live up to the law of the contract or the law of the building." *Thornton v. Dow*, 60 Wash. 622, 637, 639.

VI

The doctrine *res ipsa loquitur*, which is the subject of the present point, has been thus defined by this Court and by the Supreme Court of the United States as well:

"When a thing which causes injury, without fault of the injured persons, is *shown to be under the exclusive control* of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Citations.) (Italics ours.) *San Juan Light Co. v. Requena*, 224 U. S., 89, 98-9; *Chesapeake Beach Railway Co. v. Brez*, 39 App. D. C. 58, 73.

In *Kohner v. Capital Traction Co.*, 22 App. D. C., 181, 187, this Court held that it is not the fact of the occurrence of an accident which gives rise to the application of the doctrine *res ipsa loquitur*, but the circumstances under which it occurs, one of which must be that "the management and control of the thing which has produced the injury is exclusively vested in the defendant," wherefore, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present.

And in *Sullivan v. Capital Traction Co.*, 34 App. D. C., 358, 369, 371, 372, this Court also said:

“There are some cases in which it has been said that the law presumes negligence on the part of the carrier from the mere happening of an accident to a passenger. This is not a strictly accurate statement of the law. The most that can properly be said is that, when an injury occurs through some accident to the means of transportation which is under the management of the carrier’s employees, and which, if they exercise proper care, cannot ordinarily happen, it affords reasonable evidence, in the absence of explanation, from which negligence may be inferred. (Citation.) * * * A clear statement of when this maxim of law applies is found in Salmond on Torts, p. 29, where the author says: “There must be reasonable evidence of negligence,” it is said in *Scott v. London & St. K. Docks Co.*, 3 Hurlst. & C., 601, “but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.” ’ ’ ’

The foregoing excerpt from the case of *Scott v. London & St. K. Docks Co.*, 3 H. & C., 596, is quoted with approval in *Transportation Co. v. Downer*, 11 Wall., 129, 134.

In *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S., 551, 555, cited by the same Court in *San Juan Light Co. v. Requena*, 224 U. S., 89, *supra*, p. 77, the Court said:

“As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such

damage was done in this case was *prime facie*, and, if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed." (Citations.)

In 2 Cooley on Torts, 1424, cited by the Supreme Court in *San Juan Light Co. v. Requena*, 224 U. S., 89, *supra*, p. 77, the author says:

"The rule known as *res ipsa loquitur* may be thus stated: When a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care."

In 6 Thompson on Negligence, Section 7635, it is said:

"Sometimes the duty which the defendant owes to the plaintiff is of such a nature that proof that the accident happened to the plaintiff under certain circumstances will be of such legal value as to afford evidence of negligence on the part of the defendant, and make out a *prima facie* case in favor of the plaintiff. This is the doctrine of *res ipsa loquitur*, which is never applied unless the thing causing the accident is under the control of the defendant or his servants, and the accident is of a kind which does not ordinarily occur if due care has been exercised."

In *Oil Co. v. Torpedo Co.*, 190 Pa. St., 350, 353, also cited by the Supreme Court in *San Juan Light Co. v. Requena*, 223 U. S., 89, *supra*, p. 77, the Court said:

“The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from doubt and show, not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows as that complained of. * * * In cases where the duty is not absolute, like that of a common carrier to exercise the highest care and skill in regard to the safety of a passenger who has committed himself to its charge, but arises in the course of business, it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence.”

In *Cross v. Koster*, 17 App. Div., 402, 405, the Court said:

“Wherever that doctrine has been applied, and, from the mere happening of an accident to a mere passer upon the public street, a *prima facie* case held to have been made out, it will be noticed on reading the cases that it was always against one who was in control or possession of the premises, building or property involved.”

“There are several conditions which are essential to lay the foundation for any presumption. One is that the thing must be under the management of the defendant or his servants.” *Lennon v. Rowitzer*, 57 Conn., 583, 587.

“The doctrine only applies, however, where the machine, appliance or thing from which the injury results is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those in control use proper care.” (Citations.) I. C. R. R. Co. v. Swift, 213 Ill., 307, 316.

“Undoubtedly there are instances where the proof of negligence sufficient to make out a *prima facie* case may be supplied by a presumption that arises from the occurrence of the injury. But in such cases it must appear that the instrumentality which inflicted the injury was in the control of the defendant, subject to his use and inspection, and also that the accident was one which in the ordinary experience of mankind would not have happened unless from the negligence of the defendant, or that of others for whose negligence he is legally responsible. Where the injury might well have resulted from one of many causes, the plaintiff, by a fair preponderance of the evidence, must exclude the operation of those causes for which the defendant is under no obligation. The thing which caused the injury must be shown to have been under the management of the defendant before the doctrine of *res ipsa loquitur* applies. Indeed, the theory of the law in respect of this doctrine proceeds from the fact that the management or control of that which occasioned the injury is exclusively within the power of the defendant as between him and the plaintiff, and that it works no injustice by requiring him to explain.” Prest-O-Lite Co. v. Skeel, 182 Ind., 593, 599.

“It must be shown that such party is in entire control of the operations, machinery and appliances causing the injury.” Dalzell v. N. Y., New Haven & Hartford R. R. Co., 136 App. Div., 329, 331.

“That doctrine has no application ‘unless the thing causing the injury is under the control of the defendant or his servants, and the accident is of a kind which does not ordinarily occur if due care has been exercised.’ ” (Citation.) *Paris, etc., Railway Co. v. Robinson et al.*, 114 S. W., 658, 662 (Tex.).

“The doctrine rests upon the assumption that the *thing* which causes the injury is under the exclusive management of the defendant, and the evidence of the true cause of the accident is accessible to the defendant and inaccessible to the person injured. (Citations.) * * * And the doctrine *res ipsa loquitur* can have no application where the accident is due to a defective appliance under the management of the plaintiff; nor to a case involving divided responsibility, where an unexplained accident may have been attributed to one of several causes, for some of which the defendant is not responsible.” *Peters v. Lynchburg Traction Co.*, 108 Va., 333.

See, also, to the same effect:

City of Corbin v. Benton, 151 Ky., 483, 486;
Bjornson v. Saccone, 88 Ill. App., 6, 11;
Woczynska v. Chicago Consolidated Traction Co., et al., 156 Ill., App. 587;
Odum v. Corn Products Refining Co., 173 Ill. App., 318;
Dawson v. Allen, 191 Ill. App., 399;
Sund v. W. & P. Traction Co. (Dela.), 114 Atl. 281, 284;
Clark v. Granby Mining & Smelting Co. (Mo.), 183 S. W. 1099, 1102;
Robinson v. Empire City Subway Co. et al., 103 N. Y. Supp. 717;
Griffen v. Maurice, 166 N. Y., 188, 193;

Grant v. Metropolitan St. Ry. Co., 99 App. Div.,
422, 425;
Elliott v. Brooklyn Heights R. R. Co., 127 App.
Div., 300;
Laforrest v. O'Driscoll, 26 R. I., 547;
Murray v. Pawtuxet Valley St. Ry. Co., 25 R. I.,
209;
Larrabee v. Des Moines Tent & Awning Co. (Ia.)
178 N. W., 373, 375;
Ross v. Cotton Mills, 140 N. C., 115.

It is evident, therefore, that the doctrine *res ipsa loquitur* has no application to the present case, at least in so far as the appellant is concerned, because he was not in exclusive—or, indeed any—control of the premises at the time of the fatality. The declaration invokes that doctrine as to all of the defendants, the appellant included. The doctrine being inapplicable as to him, it was essential to plead facts showing his negligence.

At the trial, the appellee could not rely upon this doctrine as to one or more of the defendants, and prove the facts as to one or more of the others. Such proof of the facts would apply equally to all, and would constitute a waiver of his invocation of the doctrine as to any. Sullivan v. Capital Traction Co., 34 App. D. C.

Nor could he, by way of pleading, rely upon the doctrine as to some and plead the facts as to others, in a single declaration, for such pleading of the facts would waive the reliance upon the doctrine. Sullivan v. Capital Traction Co., 34 App. D. C. 358.

A plaintiff is permitted to resort to this doctrine only on the theory that he does not know, and the defendant does know, the cause of the occurrence; and when, by his pleading or his proof, he shows his own knowledge thereof, the doctrine ceases to be appli-

cable to his case. *Sullivan v. Capital Traction Co.*, 34 App. D. C. 358.

Such a joinder of parties, therefore, should not be countenanced. It but illustrates the confusion and disorder adverted to by the Court in *Wiest v. Electric Traction Co.*, 200 Pa. St. 148, *supra*, p. 28.

Both the demurrer and the motion to strike out should, therefore, have been sustained; the former because of the omission to plead the facts showing appellant's alleged negligence, and the latter because of sure misjoinder.

VII.

This final point deals with the applicability of the law of nuisance to the facts of the present case.

As hereinbefore stated, the point was not raised by counsel on either side in the trial court, but was brought into the case by the opinion of the learned trial justice in overruling the demurrer. That opinion, which was written and filed in the *Sturgis* case, after reference to the contentions respecting general allegations of negligence and the doctrine *res ipsa loquitur*, declared the *Sturgis* declaration to be sufficient as against a general demurrer, and stated the remaining question to be "whether one who negligently and defectively *constructs* a building which, thereafter, because of such faulty construction, collapses and injures a third person, is exempt from liability, because, at the time of such accident, the building had been completed and turned over by the architect, contractor, or subcontractors, as the case may be, to its owner, who, thereafter, operated the same, and was in the exclusive operation and control thereof at the time of the accident." (*Italics ours.*)

The question, as thus stated, of course, is not the

same as we have here, for the Urdong declaration does not allege that the appellant constructed the building or participated therein to any extent, but only that he was engaged to cause the building to be erected, as herein before pointed out.

Considering this question, however, as one of controlling ultimate importance and as involved in conflict of judicial decision, the trial court expressed the importance of finding a local decision controlling the question, and cited as such the opinion of this Court in *Washington Ry. & Elec. Co. v. Washington Terminal Co.*, 44 App. D. C. 470, saying:

“There, the Washington Ry. & Elec. Co. sought to recover for damage to its tracks, conduits, viaducts, foundations, and supports therefor and used in connection therewith, along First Street, East, between East Capitol Street and B Street, North, resulting from the sinking of the surface of the street; and which condition was claimed to have been occasioned by the *construction* of a steam railroad tunnel under the West side of the street named; or, in other words, by the erection and continuance of a nuisance. It seems that the Philadelphia, Baltimore & Washington R. R. Co., hereinafter called the Philadelphia Company (under the authority of an act of Congress in that behalf), undertook the construction of the railroad tunnel, at the place named, and did construct it, acting therein by and through the New York Continental Jewell Filtration Co. It was claimed in the case that the tunnel was *negligently* constructed. The Philadelphia Company, with other companies, was sued by the street railway company for damages concerning the matter, and, among other defenses interposed by it, was that, upon the completion of the tunnel, it was turned over to the Washington Terminal Company; which

latter company, thereafter, *operated* it; the Philadelphia company, from thence forward, and in common with other railroad companies, merely having the use thereof under a stipulated rental. Verdict and judgment were against the Philadelphia company.

"In disposing of said asserted ground of non-liability, the Court of Appeals, in its opinion, thus stated:

" 'The further contention is made by this appellant that it ought not to respond in damages, because the evidence shows that, immediately after the completion of the tunnel, it was turned over to the terminal company, which company has since operated it. So thoroughly is the rule established that he who erects a nuisance continues liable as long as the nuisance continues, that it is unnecessary to dwell upon this contention. (Citations.) In the last case cited, the Court said: 'The ground upon which the alienor is held liable for a nuisance created by him is, that he is the author of the original wrong, and transferring the premises with the original wrong, still existing is treated as affirming the continuance of it.'

"If a defectively and negligently constructed tunnel may properly be regarded as a nuisance; it would not seem unreasonable to apply the same doctrine to a defectively and negligently constructed theater building; so, too, if one who defectively and negligently constructs a tunnel, which brings about a condition of depression of street railway tracks on the surface overhead, is liable for damage which results *after* the completion of the tunnel, and while it is being operated by its owner; what sound reason is there for denying like responsibility and liability when a defectively constructed theater collapses and kills and injures scores of persons then present in the building as patrons?

“It has been remarked both by text writers, and in judicial decisions that it is not always easy to make an exact distinction between negligence and nuisance, and this for the reason that the same act not infrequently constitutes both negligence and a nuisance.

“Be that as it may, and whether the present action, viewed, as of course it must be, in the light of the averments contained in the declaration; and whether the action be deemed to be one in negligence merely, not involving the element of nuisance, or whether it properly may be regarded as one in negligence embracing as well the element of nuisance; the Court is of opinion that the demurrer herein should be *overruled*.”

Reading the foregoing excerpt from the opinion of the trial court, one would suppose that, in the Terminal Company case, the question was whether the New York Continental Jewell Filtration Company could be held in that suit, but there was in fact no such question before the Court. That company was not a party to the suit. The facts were, that both of the defendants, the Philadelphia, Baltimore & Washington Co. and the Washington Terminal Co., together, constructed a tunnel and “the agreement entered into at the time between the Philadelphia Company, the Baltimore & Ohio Railroad Company, and the Terminal Company recited that the ‘Terminal Company *had under construction and would operate and maintain* a railroad and appurtenances,’ including this tunnel” (p. 486). At the completion of the tunnel so constructed by both the railroad and terminal companies, the former undertook to divest itself of the management and operation of the tunnel, by turning the same over to the terminal company, and this Court held, the

tunnel constituting a nuisance as to the Washington Railway & Electric Company, that the railroad company as well as the terminal company continued liable so long as the nuisance itself continued to exist.

The facts, as to the nuisance, were that the tracks, conduits, viaducts, foundations and supports therefor and used in connection therewith, of the Washington Railway & Electric Company along First Street, East, between East Capitol Street and B Street, North, had been damaged by the sinking of the surface of First Street, which in turn had been occasioned by the construction of the steam railroad tunnel under the West side of that side. The street railway company was senior occupant of the street under a franchise granted by Congress. The tunnel had also been constructed by authority of Congress, under acts authorizing the Baltimore & Ohio Railroad Company to incorporate the terminal company, authorizing and requiring the Philadelphia Company "or the terminal company * * * and each of them" to locate, construct, maintain and operate a double track underground tunnel along the route specifically prescribed by Congress, a part of which underlaid the tracks of the street railway company at the point in question. The plans for the construction of the tunnel to be submitted for approval to the Commissioners of the District of Columbia, the Superintendent of the Library of Congress and the Secretary of War, which was done, and the customary permit was also obtained for the tunnel work, which permit in terms provided that "the responsibility for any and all expense and damages to person or property directly or indirectly resulting therefrom, due to or connected with the construction, maintenance or operation of the work, whether done

by the railroad company or others in connection with it, to be assumed by the railroad company," and the conditions of this permit were accepted by the Philadelphia Company in writing. In the work of erecting the tunnel a method of construction was adopted of which this Court said:

"No method of construction is so liable to result in street settlement as the method adopted in this case." (P. 476.)

The contractor endeavored to have a different method adopted, and the "Superintendent of the Congressional Library warned the Philadelphia Company that the method pursued would result in the settlement of the street. * * * Similar warning was given by the Engineer Commissioner of the District, to which warning the company replied that, if there should be any further settlement of the street, 'we will have to make it good.'"

Yet the opinion of the learned trial justice in the Sturgis case compares as identical the present case with that one. Not only was there no contractor, subcontractor or materialman involved there, but knowledge and warning of the danger were given in advance, and the work was done in a public street. Here, Wagner is not the owner of the property, did not prepare, and had nothing to do with, the plans and specifications, had no knowledge of the dangerous condition and was not chargeable therewith, and did no more than merely cause the erection of a building for private individuals upon privately owned land in accordance with plans and specifications supplied by the owner for the purpose. This is the true intent and

meaning of the declaration, and the only thing that can be drawn from it.

“It would be a hard and impracticable rule to announce that a man who had performed his duty under the contract should be held responsible for the sufficiency and correctness not of the work which he performed, but of the plans which are furnished him to be carried into execution. It may readily be conceived that a carpenter or builder may have the mechanical knowledge and skill to erect a building or structure of any kind, when he would in no way be competent to determine its safety or whether it would meet the requirements of its construction. Frequently such questions would have to be determined by skillful and learned engineers. In the course of building bridges, the resisting and sustaining power of material would have to be scientifically determined; and it would be a strange law indeed that, under such circumstances, a mechanic would be held responsible for a mistake in a calculation of this kind. The result would be, either that contractors would refuse to erect structures, or that, in order to make themselves safe, they would charge such prices as would be prohibitive.” *Thornton v. Dow*, 60 Wash. 622, 637, a nuisance case.

If the owner of land causes a building to be erected thereon which becomes a nuisance, it is easy to understand why he is to be held responsible therefor, without regard to his own actual negligence for the reason that as the owner of the land he owes a duty to his neighbors, to those who pass the building in the street, and to those whom he invites into it. But if the owner calls upon a contractor to “cause the building to be erected,” or even actually to erect it, or if the owner

or such contractor, or the owner's architect or agent, purchases material from one or more different parties for the erection of the building, and engages sub-contractors to do part of the work, and they employ mechanics and laborers to prepare and deliver the material and to put it in place, it is difficult to see why or how each of them is to be considered one "who erects a nuisance," for there is no duty owing by them or any of them to any one other than their employer or the one with whom they make their contracts. If, as we have seen in an earlier part of this brief, such contractor, materialman, sub-contractor, mechanic and laborer owe no such duty so as to be liable as for negligence to third parties, surely he does not owe the greater duty to them which makes him *absolutely* liable as for a nuisance, in effect an insurer. This proposition has been so forcibly expressed by the Supreme Court of Washington in *Thornton v. Dow*, 60 Wash. 622, that we take the liberty of making the following extended excerpts from the opinion in that case. The Court there said:

"This is an action for personal injuries sustained by the plaintiff, against the defendants as contractors, who built the present state armory building for the state of Washington, in the city of Seattle. The plaintiff alleged negligence in the construction of a balcony railing, constructed in such a way as to render the same dangerous; that it was dangerous, and that by reason of its frailty the plaintiff and others, while witnessing an athletic meet, were precipitated over the balcony railing and were injured. The defense was, that the building was constructed in accordance with the plans and specifications; that prior to the date of the accident (which was May 6, 1909) the build-

ing had been turned over to the state through its agents; that the state had taken absolute possession of the building, and that the defendants had nothing whatever to do with giving or permitting the athletic entertainment at which the accident occurred. These were, in substance, the issues presented.

"The case was tried by a jury, who returned a verdict in favor of defendants. A motion for a new trial was interposed, and was granted because, in the opinion of the court, the jury had disobeyed the instructions of the court in this: The court defined a nuisance to the jury, and instructed the jury that, if they found that this structure was a nuisance from the beginning, the question of occupancy cut no figure in the case, and that the defendants would be liable as the creators of such nuisance; and in order to make this effective, the following question was propounded to the jury for answer:

'At the time of the occurrence of the accident in question in this case, was the railing around the balcony in the drill hall of the armory, and particularly was that part of the railing on the east side of the drill hall, a nuisance within the definition of a nuisance as contained in the instruction of the court?'

"The jury answered this question in the affirmative, but also found for the defendants. Deeming this a refusal on the part of the jury to follow the instructions of the court, the motion for a new trial was sustained; and from the granting of such motion this appeal is taken. * * *

"So that is becomes necessary to determine whether the instruction given by the court, to the effect that if the jury found that the railing was a nuisance the defendants would be responsible, was erroneous. We think, under the great weight of authority, that it was. The word 'nuisance' is so comprehensive that it has been applied to al-

most all wrongs which have interfered with the rights of the citizen, either in person, property, the enjoyment of his property, or his comfort, and is defined as, 'anything that worketh hurt, inconvenience, or damage.' (citation.) It is also defined as, 'anything that unlawfully worketh hurt, inconvenience or damage.' (citation.) Russell, in his treatise on Crimes, said: 'nuisance' signifieth anything that worketh inconvenience. Whatever unlawfully annoys or does damage to another is a nuisance.' (citation.) A 'nuisance,' as ordinarily understood, is that which is offensive and annoys and disturbs. (citation.) A 'nuisance' is that which disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable. (citation.) The term 'nuisance,' derived from the French word '*nuire*' to do hurt or annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights.' Addison on Torts, 155. There are very many other definitions of the word or term 'nuisance' which, in effect, spread it over almost every injury that is done by one person to another; but we have cited enough to show the general idea of the term nuisance.

"Now, it is earnestly contended by the respondent that the general rule is that all parties to a nuisance, he who creates it and he who maintains it, are responsible for its effect without limitation of condition or of time; and this is undoubtedly true as to a certain class of nuisances—what are termed nuisances *per se*. But in order to intelligently consider these general announcements in regard to the responsibility of parties to a nuisance, whether of owners or builders or lessors or lessees or contractors, the term and the responsibility must be classified, or an investigation, however extensive it may be, results only in confusion. This classification is intelligently set forth in McCaffrey

v. Mossbert & G. Mfg., 23 R. I. 381, 50 Atl. 651, 91 Am. St. 637, 55 L. R. A. 822, where it was held that the manufacture of a drop press was not liable to a purchaser's employee for injuries caused by the breaking of a defective hook holding a heavy weight, the cause of the injury not being in its nature imminently dangerous, and there being no fraud or concealment or implied invitation to the employee to use the machine. The court in that case said:

'Cases which involve the liability of a defendant to those with whom he does not stand in privity of contract may be grouped into three classes: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the thing (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous. The principle that governs the first class of cases is that one who deals with an imminently dangerous article owes a public duty to all to whom it may come, and whose lives may be endangered thereby, to exercise caution adequate to the peril involved.' "

"This principle has been applied in many cases to the sale of poisonous drugs under a false label, where dangerous naphtha was sold, where laudanum was sold for rhubarb, and in general where the action was in relation to the things that were inherently dangerous, as where the air which people breathe is poisoned or polluted with noxious vapors, where vicious animals are allowed to run at large, and where deadly missiles are thrown into a gathering or crowd of people. Said the court in that case:

“A similar principle governs the second class of cases, in which the degree of danger in the thing itself may be less, but where the seller actually knows of the danger in the article and puts it forth by some fraud or deceit. In such cases the breach of duty grows out of the fraud or deceit in the sale, and it extends to persons injured thereby, who may reasonably be deemed to be within the contemplation of the parties to the transaction.”

“And instances are given by the court of this character of nuisances. It will be seen that this case does not fall within either of these classes. The thing built or constructed here—the armory—of course, was not of a noxious or dangerous kind, and nothing noxious emanated from it; and within itself it could not be said to be dangerous. The danger would depend entirely upon the use to which it was put. The third class of cases said the court in the case we have just been reviewing, relating to the sale of a thing not in its nature dangerous, rest upon the principle that in such thing there is no general or public duty, but only a duty which arises from contract out of which no duty arises to strangers to the contract. It will be seen in this case that there was a contractual relation between the builders—the owners of the armory and the contractors, which ended with those two parties. The principle governing this sort of a transaction is treated of by Cooley on Torts (2nd ed.), 672, where the author appropriately remarks:

“An attempt to classify nuisances is, therefore, almost equivalent to an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights. It is very seldom, indeed, that a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general that it is likely to define nothing.”

"It is also treated of by Wharton in his Law of Negligence (2d ed.), c. 438, *et seq.*, and he bases the the liability on the law of contract and of what he terms "causal connection," as will be seen from the the following excerpt:

"Thus a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion, is, that otherwise there would be no end suits. But a better ground is that there is no causal connection, as we have seen, between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent responsible agent, breaking the causal connection."

"Many cases are cited which seem to be squarely in point sustaining the text. It will be seen, however, that this is a stronger case against the respondent's contention than the case at bar; because, in the instance given by the learned author, the accident was caused by the contractor's negligence; while in the case at bar, if the contractors are to be held liable under the testimony, they are liable because they carried into effect the plans and specifications which were furnished them by the owner.

“There is an attempt by the respondent to establish the fact that there was no specification as to the manner in which the railing should be attached; and that, inasmuch as there was a provision in the contract for an application to the architect to furnish specifications when any were omitted, and as no written application had been applied for, the contractors themselves became responsible for the manner in which the railing was fastened to the building. But the overwhelming and undisputed testimony is that, while no written application was made to the architect, he was there, looking over the work and seeing how the work in every particular was done; and it must be reasonably concluded that this part of the work, as well as all the rest, was done by consultation with, or by at least the consent and direction of, the architect. The testimony of the architect, as to the building being completed in every respect according to the specifications, is so direct and positive that there can be no question raised about it. It would be a hard and impracticable rule to announce that a man who had performed his duty under the contract should be held responsible for the sufficiency and correctness not of the work which he performed, but of the plans which are furnished him to be carried into execution. It may readily be conceived that a carpenter or builder may have the mechanical knowledge and skill to erect a building or structure of any kind, when he would in no way be competent to determine its safety or whether it would meet the requirements of its construction. Frequently such questions would have to be determined by skillful and learned engineers. In the case of building bridges, the resisting or sustaining power of material would have to be scientifically determined; and it

would be a strange law indeed that, under such circumstances, the mechanic would be held responsible for a mistake in a calculation of this kind. The result would be, either that contractors would refuse to erect structures, or that, in order to make themselves safe, they would charge such prices as would be prohibitive.

“In reviewing the many cases that have been cited to us, and which we have been able to find through our own research, there has entered into nearly all of them, where the contractor has been held liable, the element of negligence or of violation of contract. The respondent cites the following from Wood on Nuisances, vol 2 (3d ed.), c. 703, under the heading, “Personal injury always actionable when person injured is free from fault”:

“It should perhaps be stated that for personal injuries sustained by a person by reason of any nuisance in a highway, of injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if the person injured was in the exercise of ordinary care when the injury was inflicted, and no degree of care on the part of the person erecting or maintaining the nuisance will exempt him from liability. The act is a wrongful one, and he is answerable for all the consequences that flow therefrom, to a person who is not chargeable with negligence by reason of which the injury is inflicted.”

“Citing to sustain the text, *Jones v. Chantry*, 4 T. & C. (N. M.) 63, and *Chicago v. Robbins*, 2 Black (U. S.) 418. In *Jones v. Chantry*, the defendant placed wagons in a highway, and the plaintiff, in turning to avoid collision with the wagons, ran upon a heap of sand

which had been hauled there by the defendant, and was thrown out of his wagon and injured. It was held that the defendant, having directed where the sand should be deposited, was not exempted from liability for the injury caused by it because the person who placed it there was a contractor for the erection of the building in which it was to be used. It will be seen that this was the ordinary case of damages for obstruction in the street, which was directed to be placed there by the defendant in the case, and in no way bears upon the text announced by the author above quoted. In *Chicago v. Robbins*, so far as the question under discussion by the the learned author was concerned, it was simply held that, if a nuisance necessarily occurs in the ordinary mode of doing work, the occupant or owner is liable; but if it happens by the negligence of the contractor or his servants, the contractor alone is liable. That, too, is the universal doctrine in relation to the liability of independent contractors, and in no way bears upon the subject under discussion, where as we have seen, this case must be dealt with on the theory that there was no independent negligence on the part of the contractors.

“In *Galbraith v. Illinois Steel Co.*, 133 Fed. 485, 2 L. R. A. (N. S.) 799, it was held, where the owner of a building contracted with the company to install a sprinkler system according to plans and specifications, and the company contracted with the defendant for the construction of the support, but in the actual construction a tie member specified in the plans was omitted by the defendant, and by reason of such omission the support afterwards collapsed and damaged the plaintiff, the plaintiff could not maintain an action in tort to recover such loss from defendant, whose duty was measured by the requirements of the contract and was

enforcible only by the other party to the contract; the court basing its opinion on the doctrine, announced above by Wharton, that there was no contractual connection between the defendant and the plaintiff. Judge Grosscup dissented in that case—not upon the theory contended for by the appellants in the case, but upon the theory of contractual responsibility.

“The modern structure,” said the judge, “is the work of many trades. To safely erect such structure, plans and specifications covering the whole, by competent architects, are not simply a convenience—they are a necessity. Through such plans and specifications alone, can the work of the many trades be coordinated. Through them alone, in the midst of diversity can the owner build to a given end. Plans and specifications, therefore, are essentially the Law of the Building. They are in practical effect, the owner’s direction to the contractors—not simply to the immediate contractor, but to all who take contracts subservient thereto, a direction that each contractor by taking his contract in reality accepts; and safety and good faith demand not simply that contractors should perform their contracts with each other, but that each contractor, by living up to the Law of the Building, should obey the direction thus given and accepted, and thus perform his duty to the owner—indeed, to all who may, in person or property, be directly affected by the buildings being erected in accordance with the plans and specifications.”

“The term ‘law of the building,’ is a happy and forceful expression, and is particularly pertinent to the facts of this case. No higher duty, it seems to us, can be demanded of the ordinary contractor in building structures of this kind, than to live up to the law of the contract or the law of the building. In First Presby-

terian Congregation v. Smith, 163 Pa. 561, 30 Atl. 279, 43 Am. St. 808, 26 L. R. A. 504, it was held, not only that a contractor was not liable, but that the negligence of a contractor in building a sewer for a city would not render him liable to the owner of private property which was injured by the breaking of the sewer, after the completion of the work and its acceptance and use by the city. This case goes beyond the defense in relation to following the specifications, but also reaches the other defense that the property had been turned over to the owner and that the contractor was no longer responsible for it. In this case the class of cases which may be termed nuisances *per se* were noticed and distinguished from the case under consideration. It announces its allegiance to the rule of causal connection put forth by Mr. Wharton as above cited, and reaffirmed the doctrine of Curtin v. Somerset, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. 220, 12 L. R. A. 322, which is severely criticized by learned counsel in this case.

In Curtin v. Somerset, it was held that, in order that a person who had been injured by an accident may hold another liable therefor upon the ground of negligence, there must be a causal connection between the negligence and the hurt; and that such causal connection must be uninterrupted by interposition between the negligence and hurt of any independent human agency. It was there held that a contractor for the erection of a hotel building, who used improper material in its construction and in other respects departed from the specifications embodied in his contract, so that the building when completed was structurally weak and unsafe, would not be liable to a guest of the hotel for an injury caused to him by such defective construction occurring after the owner had taken possession. That

case was distinguished from *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, where the court held a dealer in drugs and medicines, who carelessly labeled a deadly poison as a harmless medicine and sent it so labeled into market, was liable to any one who was injured without any fault on his part; holding that there was no analogy between that class of cases and the one under consideration. It is intimated by learned counsel for respondent that this case stands alone and ought to receive the condemnation of other courts, but from our investigation it seems to us that it is well sustained by authority, and omitting that portion of the case which bears upon the liability of a negligent contractor, meets with our endorsement.

“In *Lancaster v. Connecticut Mut. Life Ins. Co.*, 92 Mo. 460, 5 S. W. 23, 1 Am. St. 739, the distinction was made between a case where the negligence which produced the injury was in the workmanship or materials to be furnished by the contracts, and one where the negligence was in the plans and specifications; and held that in the latter case the defendant would be relieved from liability. This case, we think, is in harmony with the great weight of authority and with right reasoning.

“In *Mayor, etc., of Albany v. Cunliff*, 2 Coms. (N.Y.) 165, it was held that the mere architect or builder of a public work was answerable only to his employers for any want of care and skill in the execution thereof, and that he was not liable to third persons for accidents or injuries which might occur after the completion of such work; a much stronger case than the one under consideration. The court, in the course of its remarks in that case, at page 174, said:

“But the bridge was completed, and had been in the charge of pier owners, more than three

years before it fell and injured the plaintiff. In such a case, there is neither precedent nor principle for allowing a third person to turn from those who are bound to maintain the bridge, and bring an action against the architect or builder. He is only answerable to those for whom he builds."

"The court added:

"He is not answerable to them, if he builds according to his contract or duty, however frail the structure may be. But the owner, on whom the duty of maintaining rests, is answerable to third persons for the sufficiency of the work, whether he has been injured by the builder or not."

"The court then proceeds to the statement that a party who has erected a nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land, but that it is only where he continued to derive a benefit from the nuisance; citing different cases to that effect. But even in those cases it was an erection of a nuisance by the owner or director that was spoken of.

"In *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 57 Am. St. 204, 32 L. R. A. 837, it was held that the negligence of a contractor in reconstructing a building would not render him liable to a third person who was injured in consequence thereof, after the work had been completed and accepted by the owner of the building; endorsing the rule of causal connection before referred to, and citing many cases to sustain the doctrine. Without further discussion, the same doctrine is announced in *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Paterson Extension R. Co. v. Rector*, etc. (N. J.), 53 Atl. 449; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19,

and a wilderness of other cases bearing directly or indirectly upon this proposition.

“The respondent attempts to show that many of the cases which we have reviewed did not sustain the doctrine of non-liability on the part of the contractor, but we think that they unquestionably do, and that the attempt has not been successful. Few of the cases relied upon by the respondent really sustain his view. From a thorough investigation of this question—for it has been an interesting one and the court is indebted to counsel on both sides for great research and industry in presenting it in a masterly way—we are compelled to hold that, especially in the absence of negligence on the part of an independent contractor—a question which under the testimony in this case we think is not pertinent—and especially where the structure has been taken over by the owner and accepted as completed under the plans and specifications, such contractor is not responsible to third parties for injuries sustained by any defects in such structure. * * *”

The views thus expressed by the Washington Court are not without support in our own decisions. This Court has several times recognized the “negligent, improper and unlawful” feature as the controlling one in certain nuisance cases. *Roth v. District of Columbia*, 16 App. D. C. 323, 355; *Akers v. Marsh*, 19 App. D. C. 28, 42; *French v. Association for Works of Mercy*, 39 App. D. C. 406, 412.

That the same condition of affairs may constitute a nuisance with respect to one defendant and mere negligence in so far as another is concerned has been recognized by this Court and by the Supreme Court of the United States. *Domer v. District of Columbia*, 21 App. D. C. 284; *O'Dwyer v. Northern Market Co.*,

30 App. D. C. 244; *Chicago City v. Robbins*, 2 Black. 418.

Thus, in *Domer v. District of Columbia*, 21 App. D. C. 284, the District of Columbia had authorized one Waggaman to enclose the parking around his building with an iron fence containing two gates to open inwardly, one of which the owner for a long time permitted to swing outwardly over the sidewalk, striking and injuring passers-by, one of whom was seriously injured and brought suit, not against the owner however, but only against the District of Columbia. A gate so swinging across the sidewalk dangerously by night and by day was of course a nuisance equally as much as a dangerous building, and had the owner been sued he would have been liable for the nuisance, if any one can be so held in the present case; but this Court held that the District of Columbia was not liable on the ground of nuisance but only of negligence, and that notice of the existence of the danger must be brought home to the District actually or constructively before its liability will attach.

And so here, if the appellant or any one other than possibly the owner is to be held, it is for negligence rather than for nuisance. The law is the soul of reason. The law of nuisance is the expression of a principle devised for the promotion of the welfare of society. It must be balanced with other principles likewise devised, for the progress of civilization, business and commerce.

In *O'Dwyer v. Northern Market Co.*, 30 App. D. C. 244, it appeared that a market company for many years rented to hucksters the privilege of using a sidewalk adjoining its market, and that police officers had driven away hucksters who would not pay for

such privilege. Plaintiff, a pedestrian, suffered injuries resulting from slipping on refuse matter on the sidewalk, and it was held that the market company was chargeable with nuisance but the municipality only with negligence in not suppressing it, notwithstanding the fact that its own police officers had actually participated in creating the condition by driving away the hucksters who refused to pay for the privilege.

Surely, if the District of Columbia was only chargeable with negligence in that case, no one other than possibly the owner could be charged with more here, and in order to so charge them with negligence the facts constituting it must be pleaded.

Chicago City v. Robbins, 2 Black. 418, likewise recognizes and applies the rule of divisibility of responsibility for a condition into one of nuisance as to one defendant and negligence as to another. There, the defendant under the implied authority of the city dug an areaway in a public street and left it unguarded. The city was sued and compelled to pay damages. It in turn sued the property owner for reimbursement, and the Court holding that due care in guarding the area way would have prevented it from being a nuisance yet that failure to exercise such care made a nuisance of it nevertheless allowed the city to have reimbursement against the owner, because while he was guilty of nuisance the city was chargeable only with negligence.

And that case again came before the Supreme Court in 4 Wall. 657, 679, when that Court said that even though it be conceded that the defendant, the property owner, "might cast the blame on the contractor while the area was being constructed, still it is clear to demonstration that he cannot successfully make that

answer for his own negligence after the work was completed, and the control and oversight of the contractor had ceased.”

This is a direct and specific adjudication, binding upon this court and all others in this jurisdiction that, for an alleged nuisance such as was before the Court there and is relied upon here, “it is clear to demonstration” that the contractor is not responsible “after the work was completed and the control and oversight of the contractor had ceased.”

The reasoning by which it is sought to hold appellant liable as an erector of a nuisance is, that the gist of the action for nuisance is not the thing which caused the danger, but the result of that thing, the danger itself. Wood, Nuisances, Sec. 27. Upon no other possible hypothesis, can the proposition so contended for be maintained. Yet upon that line of reasoning the appellee is remediless, for the reason that the present suit, properly speaking, is not one for negligence or one for nuisance, but it is a statutory action to recover for damages caused by death and that death, in the words of the statute, must be one “caused by the wrongful act, neglect, or default” of a person or corporation. (Code, Sec. 1301.)

“The cause of action is plainly the wrongful act, neglect or default causing death, and not merely the death itself. * * * ‘The statute recognizes but one cause of suit, and that is the wrong done, irrespective of its consequences.’ ” *Holton v. Daly, Administratrix*, 106 Ill. 131, 137.

If the gist of the action, therefore, is the result, and if the cause of action consists not in the wrongful act, neglect or default but *in the danger created whether*

by a wrongful act, neglect or default or not then the requirements of the statute have not been satisfied. If, in the language of this Court in the Terminal Company case, the question of negligence is not material and the case would not be different even though "the tunnel had been carefully and prudently constructed" (pp. 482-481), the present action cannot be maintained.

The statute only authorizes recovery for death caused by wrongful act, neglect or default. The declaration charges no wrongful act or default. It attempts only to charge neglect.

"In other words, although it should appear that the company in no respect failed in its duty to the deceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But this is a misconception. Their right of action arises only when his death is caused by 'the wrongful act or neglect.' If there be no omission of duty to the decedent, his heirs have no claim. * * * The two terms, therefore, wrongful act and neglect, imply alike, the omission of some duty, and that duty must, as stated, be a duty owing to the decedent." *Northern Pacific Ry. Co., v. Adams*, 192 U. S. 440, 449, 450.

A dangerous condition is not an act, a neglect or a default, and in order to recover the appellee must bring himself within the terms of the statute. At common law there could be no such recovery, and except in so far as the rule has been changed by statute it is still the law that actions or causes of action for personal injuries resulting in death do not survive.

“By the common law the death of a human being, although wrongfully caused, offers no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured. (Citation.) Therefore, in cases like this the right of recovery depends entirely upon statute law.” *St. Louis & Iron Mountain Ry. v. Craft*, 237 U. S. 648, 655.

“Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured. The rule ‘*Actio personalis moritur cum persona*’ applies, whether the death from the injury be instantaneous or not. The act of 1908 does not provide for any survival of the right of action created in behalf of an injured employee. That right of action was therefore extinguished.” *Michigan Central Railroad v. Vreeland*, 227 U. S. 57, 67-8.

See, also:

United States Electric Light Co. v. Sullivan, 22 App. D. C. 115;
Serenson v. Northern Pacific R. Co., 45 Fed. 407;
Lovell v. DeBandelaben & C., 90 Ala. 13;
Meyer v. King, 72 Miss. 1, 10;
Chandler v. Railroad, 251 Mo. 592, 601;
Daly v. Stoddard et al, 66 Ga. 145.

Furthermore, the facts showing the existence of a wrongful act, neglect or default and that it did and how it did cause the death must be stated in the declaration with such fullness as to inform the defendant of the exact nature of the action and to enable him to prepare his defense.

“It is familiar law that the wrongful act, neglect or default must have been the proximate cause

of death in order to give a right of action therefor." *Bolton v. Public Service Corp.*, 75 N. J. L. 75.

The wrongful act, default, or neglect must be alleged with sufficient particularity to inform defendant of the exact nature of the case and to enable him to prepare his defense, and if the allegations are so general as to fail to furnish the defendant with this information the declaration is demurrable. 17 *Corpus Juris*, 1279, 1280.

Conley v. Richmond & Co., 109 N. C. 692;
Daly v. Stoddard et al., 66 Ga. 145;
Gay v. Essex Electric Street Ry., 159 Mass. 242;
Cotton Oil Co. v. Shamblain, 101 Tenn. 263;
Norfolk Ry. Co. v. Stegall's Administratrix,
 105 Va. 538;
Indiana Union Traction Co. v. Love, (Ind.) 99
 N. E. 1005;
Addison, Admr. v. Lake Shore, etc., Co., 48 Mich.
 155;
C. & B. Q. R. R. Co. v. Harwood, Administratrix,
 90 Ill. 425.

To hold the appellant on this declaration, notwithstanding the foregoing considerations, including the intervention after the completion of the building of the independent human agency of its owners and operators, requires a method of reasoning disapproved and described by the Supreme Court of the United States in the following language:

"Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends." *Sheffer v. Railroad Co.*, 105 U. S. 249, 252.

There is nothing, therefore, in the Terminal Company case lending the slightest support to the declaration here under review, either upon the demurrer or upon the motion to strike out, the question of misjoinder not having been either considered or raised in that case.

It is accordingly submitted that the order overruling the demurrer and motion to strike out should be reversed.

Respectfully,

W. C. SULLIVAN,

Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JAN 12 1924

IN THE

Henry M. Hodges

Court of Appeals, District of Columbia ^{CLERK}

JANUARY TERM, 1924.

No. 4033.

No. 38, SPECIAL CALENDAR.

FRANK L. WAGNER, *Appellant,*

vs.

NICHOLAS APFELBAUM, AS ADMINISTRATOR OF THE ES-
TATE OF ROSS URDONG, DECEASED.

REPLY BRIEF FOR APPELLANT.

W. C. SULLIVAN,
Attorney for Appellant.

cited for the proposition that one who is injured by the collapse of a bridge after it has been delivered by the contractor to the owner can recover of the contractor, even in the absence of fraud. The case does not support the proposition for which it is cited, but is quite to the contrary. The decision was rested upon the facts of dangerous construction known to the defendant, and concealed by it, the Court saying:

“Two features are conspicuously necessary to the creation of this duty to strangers to a contract: (1) That the thing be of noxious or dangerous kind; (2) that the builder, manufacturer, or contractor had actual knowledge of its being in such a state of danger as would amount to concealed danger to persons using it in ordinary manner and with ordinary care.”

The Court applied the principle thus announced in the following language:

“Defendant’s knowledge of the danger created by its negligence in the construction of the foundation is clear. * * * The jury was justified in imputing actual knowledge to the defendant. * * * That dangerous condition was concealed.”

4. *Kahner v. Otis Elevator Company*, 96 App. Div. 169, is the fourth and last case cited in the brief to which this is a reply. That case declares, in conflict with all of the other cases in New York and elsewhere as set out in the original briefs of the appellants in these cases, that the exception of inherent danger, to the general rule of non-liability, applies where the danger is one which is created by negligence,—in other words, that it is not necessary to make the thing inherently dangerous that the dangerous character inhere in the thing. With this single exception, all of the cases that we have been able to find support the rule as stated in our original brief, pp. 57-73.

The appellee in his brief in No. 4034 although, as stated, citing but four cases, adopts the brief filed by the appellee in No. 4032, thus rendering it necessary to review same.

MISJOINDER.

The first case cited under this heading is Washington and Georgetown Railway Co. v. Hickey, 5 App. D. C. 436, which went to the Supreme Court of the United States, was a clear case of concurrent negligence, and is considered at p. 26 of our original brief.

The next case cited, District of Columbia v. Bowling, 4 App. D. C. 397, is also a clear case of concurrent negligence.

Capital Traction Co. v. Vawter, 37 App. D. C. 29, presented no question such as here involved. In the language of this Court, the sole question there presented was "whether or not the Court erred in permitting two separate and distinct verdicts to be rendered by the jury and be made of record in the same cause," by directing a verdict for one defendant at the close of the plaintiff's case, instead of a single verdict at the end of the whole case, in favor of one defendant and against the other. There is not a word in the opinion of this Court in that case intimating, even, that had the objection to the declaration been raised in the same way as it has been here it would not have been sustained.

Graves v. City and Suburban Telegraph Ass'n, *et al.*, 132 Fed. 387, was a clear case of concurrent negligence. The petition alleged that a telephone company had negligently suffered the feed wire of a traction company "to be and remain for a long time" in contact with an iron spike driven into one of its poles

for a step, and the insulation at the point of contact to be and remain worn, defective and imperfect, so that the metal of said wire was in contact with the metal spike, by reason of which plaintiff's intestate, in placing his foot on the step, received a charge of electricity, which caused his death. The petition was accordingly held good as against a demurrer for misjoinder of parties defendant and for an improper joinder of separate causes of action against several defendants.

Strahaul v. Asiatic Steamship Co., 48 Ore. 100, supports the appellant rather than the appellee. In that case, a barge owner let it in an unseaworthy condition, retaining supervision over it. He allowed it to become water-logged, and it was in the joint possession of lessor and lessee at the time of its capsizing, causing the death of plaintiff's intestate. The lessor had sent the deceased to work at the pumps, knowing the situation to be dangerous, but without warning him, and the lessee had improperly loaded and used the barge. It was held that the lessor was jointly liable with the lessee, but the case was expressly distinguished from the present one, the Court saying:

"To make a tortfeasor liable jointly there must be some sort of community in the wrong-doing, and the injury must be in some way due to their joint work."

Neither *McBride v. Scott*, which is considered at p. 25 of our original brief, nor *Consolidated Ice Machine Co. v. Keifer*, which is considered at p. 21 of our original brief, supports the appellee's contentions in the slightest degree.

The only other cases cited in this connection are *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131;

Torrence v. Shedd, 144 U. S. 527; Charman v. Lake Erie, &c., Co., 105 Fed. 449, and Richardson v. Southern Idaho Water Power Co., *et al.*, 209 Fed. 949. Each of them presents only the question of removability from the State to the Federal Court, depending upon the existence of a separable controversy, and as, in all such cases, the question is not to be tested as by demurrer, these citations are beside the question; for, even where misjoinder of causes of action appears upon the face of the pleadings, that fact is not decisive of the right to remove, nor does the fact that the Court would be compelled to hold, on the face of the pleadings, that there is a misjoinder, "change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal." Alabama Southern Ry. v. Thompson, 200 U. S. 206, 215, 218.

RES IPSA LOQUITUR.

This doctrine—the thing itself speaks—applies, and applies only, in cases in which the true cause of the accident lies solely within the knowledge of the defendant, who caused it, and hence it is that it is limited to cases in which the thing causing the accident is in the exclusive management, possession and control of the defendant. See Minneapolis General Electric Co. v. Cronon, 166 Fed. 651, in the Circuit Court of Appeals for the Eighth Circuit, reviewed pp. 20-1 of Ford's original brief. Not a case to the contrary has been found by counsel on either side. There is, of necessity, the further element to the application of the doctrine, that the occurrence is one which ordinarily would not happen but for negligence. The appellee, however, seizes wholly of this element and attempts

to make it the basis of the rule, rather than the occasion for its application, which is its true and sole function.

FACTS STATED INSUFFICIENT TO MAKE OUT A CASE.

The case of *Galbraith v. Illinois Steel Co.*, 133 Fed. 485, is a direct authority for the appellants, and against the appellee. The quotation from that case at p. 13 of appellee's brief in No. 4032 is from the dissenting opinion.

In the brief in No. 4032, and on the argument, the contention was inferentially though not directly made that the case of *Thomas v. Winchester*, 6 N. Y. 397, in effect overruled *Albany v. Cunliff*, 2 N. Y. 165. In the first place, there is not the slightest ground for this contention, and in the second, it is entirely exploded by the Supreme Court of the United States in *Savings Bank v. Ward*, 100 U. S. 195.

Albany v. Cunliff went even further than we are called upon to do here, for it was a case of a public structure, a bridge, erected in a public place, for public use, while the Knickerbocker Theater was erected as a private enterprise on privately owned land. In the *Cunliff* case, the Court held that, after the contractor had completed his work and turned over the bridge he was not responsible for the injury or damage suffered by reason of its collapse. A lengthy excerpt from the case is quoted at pp. 45-7 of our original brief.

In *Thomas v. Winchester*, a case of mislabeled poison, the party guilty of the error in mislabeling was held liable, regardless of contract, and because of the duty which the law imposed on him to avoid acts in their nature dangerous to the lives of others.

The suggestion was made on the argument that a building which collapses is as much a mislabeled article as is a poison under an innocuous name. But the Supreme Court of the United States, in *Savings Bank v. Ward*, reviewed and approved both of these cases, *Thomas v. Winchester* and *Albany v. Cunliff*, and held to the contrary of this suggestion. See pp. 39-40 of our original brief. After quoting the language in *Thomas v. Winchester* laying down the rule just stated, as to mislabeled articles, the Supreme Court said in express terms, that buildings, even public works, do not fall within that category. Certainly, if a public bridge, erected by public authorities, on publicly owned land, for public use, but so defectively erected that it collapses, is not a mislabeled article within the rule of *Thomas v. Winchester*, a theater building erected by private capital, on privately owned land, can not be so considered.

At the argument it was urged that the general rule announced in *Savings Bank v. Ward*, 100 U. S. 195, and in practically all of the cases, has been disapproved in the more recent decisions. Not only is it incorrect to so state, but were it otherwise *Savings Bank v. Ward* is of course controlling in this jurisdiction. Among the numerous recent cases reviewed in our original brief which announce the same rule as does *Savings Bank v. Ward* are:

O'Brien v. American Bridge Co., 110 Minn. 364;
William v. Edward Giller Dock, Bridge & Construction Co., 258 Fed. 591, 594, (C. C. A., 6th Cir.);
Smith v. Pa. R. R. Co., 201 Pa. St. 131;
Travis v. Rochester Bridge Co., (Ind.), 122 N. E. 1;

Lydecker et al v. Board of Chosen Freeholders
 et al, 91 N. J. L. 622, 624;
 Wood et al v. Sloan, 20 N. M. 1271, 148 Pac.
 507;
 Thomas v. Laws, 221 Mass. 447;
 Healey v. Herdel et al, 210 Ill. App. 387, 392;
 McCorey v. Thomas, 109 Va. 373, 379;
 Thornhill v. Carpenter-Morton Co., 220 Mass.
 593, 597;
 Windram Mfg. Co. v. Boston Blacking Co., 239
 Mass. 123;
 Larrabee v. Des Moines Tent & Awning Co.,
 (Ia.), 178 N. W. 373;
 Miller v. Mead-Morrison Co., 166 Wis. 536, 541;
 Ford Motor Co. v. Livesay, 61 Okla. 231;
 Tyler v. Stevens Admr., 163 Ky. 770;
 Bates v. Battey & Co., Ltd., (1913), 3 K. B. 351;
 Thornton v. Dow, 60 Wash. 622.

Coughtry v. Globe Woolen Co., 56 N. Y. 124, re-
 viwed at p. 21 of the appellee's brief in No. 4032, was
 a case in which the owner of a building contracted
 with a third party to put a cornice upon the building,
 the owner who retained possession and control of the
 building during all of the time agreeing to erect the
 scaffold necessary for the purpose without cost to
 the contractor, and the scaffold so erected was so de-
 fective that it fell while a workman in the employ of
 the contractor was engaged in putting up the cornice.
 The owner was held liable upon the ground that he
 had erected the scaffold "for the express purpose of
 enabling and inducing the men who were to do the
 work to go upon it."

Devlin v. Smith, 89 N. Y. 470, considered at p. 22
 of the appellee's brief in No. 4032 was rested upon the
 same principle.

The automobile cases have already been sufficiently

and fully considered in our original brief at pp. 66-72, and we particularly invite the attention of the Court to the dissenting opinion of Bartlett, Chief Justice, at p. 71.

NUISANCE.

At the hearing, counsel for the appellee in No. 4034, invited the attention of the Court to the fact that, in the Tunnel case, 44 App. D. C. 470, the declaration pleaded negligence rather than nuisance as does the declaration here, and that liability was nevertheless held on the ground of nuisance. We have never contended to the contrary. Our contentions with respect to nuisance do not rest upon any matter of mere pleading, but are all substantive and vital.

The predominating feature of nuisance is its unlawful as distinguished from its negligent character; otherwise, every case of negligence might be considered one of nuisance. See *Salliotte v. King Bridge Co.*, 122 Fed. 378, and numerous other cases cited on appellants' original briefs. True, a given state of facts may create liability on each ground, nuisance and negligence, but if so it is an accidental circumstance, though as pointed out in our original brief, there are cases in which a thing though a nuisance as to some defendants cannot be such as to others in the absence of a showing of negligence, and it frequently happens that for the same occurrence, the liability of one party rests in nuisance and of another in negligence, as exemplified in the decisions of this Court.

Furthermore, no man is liable in damages to another except for the breach of some duty owing by him to that other. Liability is always predicated upon the existence of a duty, the breach of it and consequent damage. As conclusively appears from authorities

presented on our original brief, a contractor owes no duty to a third party after he has parted with the possession and control of the thing which he builds, subject to exceptions summarized on pp. 57-8 of our original brief, and therefore is not liable for mere negligence. These authorities establish the absence of a duty. Without that duty, there can be no liability. This is equally true whether the ground of liability is negligence or nuisance. That the article in question is inherently dangerous because of its very nature will impose liability on the grounds of negligence. Though not inherently dangerous, if made so by reason of the character of the very defect complained of, liability attaches only if he has actual knowledge of the existence of such defect and conceals the same, and this liability rests upon negligence. If the thing itself is actually unlawful, he is liable because it is a nuisance.

To illustrate, if a man digs a hole in a public street it is a nuisance, and will render him liable to any one suffering special damage therefrom, and this is true whether the hole be dug in the roadway or be a coal hole or similar opening of convenience in the sidewalk, where there is no legal authority for the making of the same. But if in the particular community, there is a law, ordinance or custom permitting the making of such holes, one doing so does not create or maintain a nuisance so long as he does not violate such law, ordinance or custom, and his liability for any injury in connection therewith must be based solely on the grounds of negligence. Unlawfulness is, therefore, the *sine qua non* to the doctrine of nuisance.

It was suggested at the hearing that the same rule might not necessarily be applied to test the sufficiency of a declaration by demurrer, as would be in passing

upon a motion for a directed verdict at the trial. Such motion would rest upon the ground that the evidence adduced was not sufficient to make out a case against the defendant. Such demurrer is made on the ground that the facts set out in the declaration are not sufficient to show a cause of action against the defendant. *Probata* and *allegata* must concur. The plaintiff has his choice as to the charges which he will make in his declaration. If he does not dare to make charges sufficient to show a case, no special indulgence should be shown to him to give him the privilege of offering his testimony at the trial only to have a verdict directed at the close of his proof. See *Mearns v. Harris*, 45 App. D. C. 536, and the other cases cited pp. 11-12 and 35 and 36 of our original brief, and 83-6 of Ford's brief.

The case of *Miller v. Mead-Morrison Co.*, 165 Wis. 536, 541, at page 66 of our original brief, to which attention was called by us at the hearing, is reported in Vol. 166 of the Wisconsin reports instead of 165.

Counsel for Ford have requested us to invite the particular attention of the Court to the cases of *Glynn v. Central Railroad of New Jersey*, (Mass.), 56 N. E. 698, at page 37 of their brief; *Wood, et al., v. Sloan*, 20 N. M. 1271, 148 Pac. 507, L. R. A. 1915 E. 766, at page 54 of our original brief and at pages 35 and 46 of Ford's brief, and *Casey v. Hoover*, (Mo.) 89 S. W. 330, reviewed pp. 69-71 of Ford's brief.

Respectfully submitted,

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